United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7333

United States Court of Appeals

For the Second Circuit

B

Docket No. 76-7333

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *et al.*,
Appellants,

–against–

JAMES DUMPSON, *et al.*,
NAOMI RODRIGUEZ, *et al.*,
Defendants-Appellees,
Intervenors-Appellees.

Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FILED
SEP 3 1976
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SECOND CIRCUIT

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JUDGE CARTER 74 CIV. 2019

CIVIL DOCKET

STATES DISTRICT COURT

Jury demand

Form No. 106 Rev. FAMILY-JUDGE-DOCKET

TITLE OF CASE

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES F. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ, MARY ROBINS; and DOROTHY NELSON SHABAZZ, on behalf of themselves and all others similarly situated,

Intervenor-Defendants.

J.S. 5 mailed	Y	Clerk	
J.S. 6 mailed		Marshal	
Basis of Action:	Civil Rights	Docket fee	
		Witness fees	
Action arose at:		Depositions	

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	Community Action		
	Intervenor		

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY & REFORM ET AL
v
JAMES DUMPSON, ET AL.

74 CIV. 2010

DATE	PROCEEDINGS	Date Order or Judgment Noted
9-74	Filed Complaint and issued summons.	
-13-74	Filed pltf's affdvt. and Order to Show Cause for a THREE-JUDGE-Court and why defendants should not be enjoined. Defendants are temp. restrained from removing Eric and Danielle Gandy from the home of Madeline Smith. Posting of Security is waived. - ret. 5-17-74 at 2 PM in Room 519 -- Carter, J.	
23-74	Filed pltfs. affdt. and notice ofmotion for an order joining Ralph and Christine Goldbert on their own behalf and as next friend for Rafael Serrano as pltfs. in this action ret. on: May 31,1974.	
23-74	Filed pltfs. memorandum in support of above motion.	
31-74	Filed stip. and order that the T.R.O. issued on 5-9-74 be continued until determination of pltf's motion to convene a three-judge court and if motion is granted until the hearing before such a three-judge court; counsel for defts. Dumpson, Beine & Dall to not appose pltfs' motion to join as plaintiffs Ralph and Christine Goldberg on their own behalf and as next friend of Rafael Serrano -- the return date of pltfs' motion is adj. to 6-5-74 -- Carter, J.	
4-74	Filed plaintiffs' memorandum of law in support of motion for the convening of a Three-Judge Court	
4-74	Filed affdvt. of service of above memorandum of law.	
5-74	Filed memo endorsed on pltf's motion to join parties: Motion granted by consent. So ordered -- Carter, J. m/n	
7-74	Filed plaintiffs' memorandum of law in support of motion for 3 Judge Court - with affidvt. of service attached.	
25-74	Filed affdvt. and notice of motion on behalf of Naomi Rodriguez, Rosa Diaz, Mary Robins and Dorothy Nelson Shabazz to intervene - ret. 7-24-74	
25-74	Filed memorandum of law in support of Intervention by Naomi Rodriguez, et. al.	
5-74	FILED AMENDED COMPLAINT	
5-74	Filed SECOND AMENDED COMPLAINT.	
9-74	Filed pltfs' affidavits of service re order to show cause for preliminary injunction ret. on 7-18-74	
9-74	Filed order designating in addition to Judge Carter, to hear and determine said cause as provided by law: Edward Lumbard, C.J. and Milton Pollack, D.J. -- Kaufman, Ch.J., C.A. m/n	
-14-	Filed copies of the Amended Petitions - served: James Dumpson by Morris Beine on 5-14-74 Elizabeth Reise by C. Richmond on 5-13-74 [illegible] Dall by Peggy Beine on 6-6-74 [illegible] by L. B. on 5-10-74	
-15-7	Filed pltf's affdvt. and ORDER TO SHOW CAUSE why an order should not be entered granting pltf. preliminary injunction against defts. Order that pending the hearing and determination of this motion, that Joseph D'Elia be temporarily restrained from removing Chery , Patricia, Cynthia, and Cathleen Wallace from the home of Dorothy and George Lhotan, and it is further ordered that posting of Security is waived - personal service by 7-[illegible] [illegible] 7-18-74 at 10 AM in Room 318 - Carter, J.	
Jul 10	Filed pltfs' Memorandum in Opposition to Intervention	
Jul 10	Filed Second Memorandum in support of request pursuant to T.R.O.P.24	
Jul 10	Filed Pltffs. Memorandum in support of Motion for the convening of a Three Judge	

DATE	PROCEEDINGS
Jul-23-74	Filed affdvt. of service re plaintiffs' memorandum of law in support of motion for the convening of a three-judge Court.
Jul-23-74	Filed affdvt. of service re plaintiffs' memorandum in opposition to intervention.
Jul-24-74	Filed stip. and order that the T.R.O. be ext. to 7-31-74. Such extension being made in the interest of preserving the status quo of four foster children, Cheryl, Patricia, Cynthia and Cathleen Wallace, and their foster parents Dorothy and George Lhotan, -- Carter, J.
Jul-26-74	Filed affdvt. of service of notice of motion to intervene and accompanying papers - served H. Lowy, Elliott Hoffman in chambe of Judge Carter.
Jul-26-74	Filed affdvt. of service of motion to intervene - served Frederick Miller at the Catholic Guardian Society.
Jul-30-74	Filed plaintiffs affdvt. of Dr. Marie Friedman
Jul-30-74	Filed plaintiffs affdvt. of service of memorandum of law filed toda
Jul-30-74	Filed plaintiffs memorandum of law in support of continuation of T.R.O.
Jul-30-74	Filed defts memorandum of law
Jul-30-74	Filed defts affdvt. of Joseph A. D'Elia.
Aug- 2-74	Filed pltf's reply to memorandum of law on behalf of Joseph D'Elia
Aug-14-74	Filed memorandum in support of pltf's motion for a declaration of a class.
Aug-14-74	Filed pltfs affdvt. and notice of motion for class action.
Aug-14-74	Filed plaintiff's interrog. set #1
Aug-15-74	Filed order that plaintiffs' motion for the convening of a three-judge court pursuant to 28:2281 and 2284 is granted; ordered that pltfs' motion to join Dorothy and George Lhotan, and Cheryl Wallace, Cynthia and Cathleen Wallace as parties plaintiff, and Joseph D'Elia, Commissioner of the Nassau County Department of Social Services, Bernard Shapiro, Executive Director of the N.Y. State Board of Social Welfare, and Abe Lavine, Commissioner of State Department of Social Services as parties defendant is gra ordered that Joseph D'Elia is restrained from removing Cheryl, et. al. from the home of Dorothy and George Lhotan, pen hearing before the three-judge court and a determination of pl motion for a preliminary injunction. Further ordered that the motion of Israel Rodriguez, Rosa Diaz, Mary Lopez and Dorothy Helen Sharpe to intervene as defendants is granted solely for t purposes of [illegible] allegations contained in pltfs' 2nd amend complaint; order that said intervenors answer the cross-claim are stricken and the issues between defendants' cross claims are dismissed. -- Carter, J. m/
Sep-5-74	Filed Memorandum in opposition to Pltfs' Motion for Declaration of a Class [illegible] Rep't. Commissioner [illegible] Social Welfare and the Latter, Indiv. and in his capacity as Commissioner of the N.Y. State Dept. of Social Services.
Oct-15-74	Filed plaintiff's affdvt. and notice of motion to declare N.Y. Social Services Law §383(2) and 400 and Title 18, unconstitutional, etc. -- set for 10-22-74 at 4:30 PM.
	[illegible]
	Filed pltf's R. 56.1 statement and exhibits in support of motion for declaratory judgment.

DATE	PROCEEDINGS
-11-74	Filed plaintiffs' memorandum of law in support of motion for leave to serve and file a supplemental complaint.
-12-74	Filed Memorandum of law in support of Intervenor-Defendants' Motion for leave to amend their answer, to add additional party Intervenor-Defendant, etc.
-12-74	Filed Notice of Motion returnable 1-7-75 for an order permitting Intervenor-Defts. to amend their answer, etc.
-17-74	Filed Notice of Motion returnable 1-7-75 for leave to join Lillian Coll. as additional party Intervenor-Defendant, to amend Intervenor-Defts. answer, etc.
18-74	Filed pltfs. affdvt. of Lisa G. Diekstein.
21-74	Filed plaintiffs' memorandum in opposition to Intervenor-Defendants' motions for leave to amend their answer, to add add. party, etc.
25-74	Filed Defts' Lavine & Shapiro's affdvt. and notice of motion for judgment on the pleadings - ret. 12-23-74 at 4 PM.
25-74	Filed Defts' Lavine & Shapiro's memorandum in opposition to pltfs' motion for a preliminary and permanent injunction and in support of defendants' motion for judgment on the pleadings.
29-74	Filed Intervenor Defts. Affidavit in opposition to motion for preliminary injunction and declaratory relief.
29-74	Filed Intervenor Defts. Memorandum of Law in opposition to motion for Declaratory Judgment or Preliminary Injunction.
4-74	Filed Pltffs. Reply Memorandum
- 8-74	Filed plaintiff's affidavits and Order to show cause for a hearing on pltf's motion for an order pursuant to Rule 17(c) - service of this OSC by 12 noon on 11-8-74 - ret. 11-15-74 at 9:30 AM in Rm 128.
- 8-74	Filed pltf's memorandum of law in support of above OSC.
-13-74	Filed ANSWER of children Danielle, Eric Gandy and Rafael Serrano HLB
-14-74	Filed affdvt. of Helen J. Buttenwieser on behalf of children Danielle, Eric Gandy AND Rafael Serrano, in re motion to prevent Helen J. Buttenwieser to represent the children.
-15-74	Filed amended summons and Marshals returns - served: Bernard Shapiro as Executive Dir., etc. by A. Coplan - 10-19-74 Joseph D'Elia, as Comm. etc. by Ann DeRenna - 10-23-74 Abe Lavine, as Comm. ect. by Arthur Coplan - 10-19-74
-19-74	Filed memorandum of law on behalf of Intervenor-Defendants.
2-74	Filed plaintiffs' memoranda of law in support of motion for a Declaratory judgment and preliminary injunction.
- 2-74	Filed plaintiffs' memorandum in support of certification of T.R.O.
- 2-74	Filed plaintiffs' memorandum of law in support of motion for the convening of a three-judge Court
- 4-74	Filed plaintiff's affdvt. and notice of motion to compel and for fees - ret. 12-13-74
- 4-74	Filed plaintiff's memorandum of law in support of above motion.
-13-	Filed Opinion #41230...Notice is directed that Lillian Coll is appointed as counsel to the foster children on an unpaid basis. Kenneth Clark
-16-74	Filed memorandum of law submitted by the [illegible] on behalf of the named plaintiff children and all others similarly situated.
-2-	Filed Opinion #41230...Pending letter of plaintiff's counsel as a motion to certify the issues for appeal pursuant to 1292(b), the motion is denied. The status quo is ordered to continue [illegible]

74 CIV. [illegible] for Equality and Reform, etc.

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date C Judgment
12- 4-74	Order that Ms. Marian Wichtin be relieved as an attorney of record and further orders that notice of this withdrawal be made upon all attorneys of record, and upon those representing the named plaintiffs as next friend in this action. - Carter, J. m/n	
Dec-31 74	Filed by Attorneys Marcia Robinson Lowry and Peter Bienstock, notice of appeal to the USCA for the 2nd Circuit from order of 12-11-74, disqualifying counsel to the plaintiffs herein from further representation of plaintiffs Rafael Serrano, Danielle and Eric Candy, and Cheryl, Cythia, Patricia and Cathleen Wallace. copies mailed to Helen L. Buttenwieser, Esq.; Stanley Kator, Esq.; Elliot Hoffman, Esq.; Jack Olchin, Esq.; Louise Gans, Esq.	
1-2-75	Filed by pltf's Foster Parents Plans, Danielle and Eric Candy, Rafael Serrano and all other children similarly situated for an order (a) staying, pendente lite, order (b) terminating the effect of a writ of certiorari into the legality of a stay which presently prevents the Catholic Guardian Society and the N.Y. City Department of Social Service from making a determination concerning the named plaintiff children who are their responsibility, etc. - ret.	
Jan- 3-75	Filed pltf's Foster Parents Danielle and Eric Candy, etal.'s memorandum in support of temp. relief.	
01-03-75	Filed plaintiffs' affidavit, set # 1	
01-10-75	Filed defts. Nassau County Department of Social Services affdvt. of James M. Gallagher in support of motion to dessolve restraining order.	
01-10-75	Filed Notice that the record on appeal has been certified and transmitted to the USCA for the 2nd Circuit on 1-10-75	
01-10-75	Filed N.Y. City defendants' memorandum of law in opposition to pltfs motion for a preliminary injunction.	
01-10-75	Filed pltf's affdvt. of Cheryl Wallace, Dorothy Thoran, Madeline Guth and Christiane Coldbery	
01-10-75	Filed defendants affdvt. of Adelin C. Hall in opposition to pltf's motion for a preliminary injunction.	
02-25-75	Filed pltf's affdvt. and order to show cause why an order should not be made enjoining Patricia Wallace and ext. restraining order to enjoin Joseph D'Elia. Ordered that pending the hearing and determination of this motion the deft. D'Elia and Patricia Wallace are temp. restrained as indicated. Posting of security is waived. Service by 2-26-75 - ret. 3-3-75 -- Carter, J.	
02-28-75	Filed order that the trial of the THREE-JUDGE-COURT be held on 3-3-75 at 10 AM - Carter, J. m/n by chambers.	
03-05-75	Filed true copy of USCA stip. and order that the appeal dated 12-31-74 is hereby withdrawn without prejudice.	
03-[illegible]-75	NON-JURY trial with 3-JUDGE COURT begun and concluded. Decision reserved on all matters except the T.R.O. was ordered vacated.	
3-27-	Filed [illegible] of defendants Joseph D'Elia and Nassau County Department of Social Services to 2nd amended complaint.	
03-27-75	Filed pltf. Foster Parents notice to take depositions of James O'Neil on 4-3-75 and Gerald Goldfeder on 4-10-75 - subp. issued	
3-27-75	Filed pltf. Foster Parents notice to take depositions of Bernard Shapiro on 4-10-75 - subp. issued.	
3-27-75	Filed pltf's Foster Parents notice to take depositions of Mary Joe Proano on [illegible]	
[illegible]-25	Filed [illegible] Parents notice to take depositions of [illegible] on dates [illegible] - subp. issued.	

DATE	PROCEEDINGS	Date Order or Judgment Note
02-75	Filed affdvt. of Louise Gruner Gans on behalf of Intervenor defendants	
-02-75	Filed affdvt. of Marcia Robinson Lowry on behalf of foster parents plaintiff.	
02-75	Filed affdvt. of Louise Gruner Gans re depositions of Dr. Robert Coles	
-02-75	Filed order that counsel shall complete the examination and cross examination of Prof. Joseph Goldstein, Dr. Albert Solnit and Prof. David Fanshel on or before 5 15-75 and commence and complete depositions of Dr Robert Coles and Bernard Shapiro by 5 20 75. Ordered that plaintiffs, Offer, et.al. shall file their post trial brief by 6-15-75 all other parties incl. pltf, children shall file answering briefs on or before 7-15-75; briefs in answer to the brief of pltf.. children shall be filed by 7-30-75. Ordered that the provisions of this order are conditioned on the availibility to the parties of transcribed copies of all depositions on or before June 10, 1975 -- Carter, J.	
25-75	Filed Transcript of record of proceedings, dated March 3, 1975	
15-75	Filed notice of entry of order of 5-2-75	
25-75	Filed plaintiffs' suppl. post trial memorandum of law in support of motion for declaratory judgment and prel. inj.	
22-75	Filed deposition of Lawrence Thomas, a witness on 5-27-75	
22-75	Filed deposition of Seymour Shapiro, a witness on 5-27-75	
22-75	Filed deposition of Albert J. Solnit on 4-1-75	
22-75	Filed deposition of Dr. Stella Chess on 4-7-75 m/n	
22-75	Filed deposition of Sidney Smetanak, a witness on 5-27-75	
22-75	Filed continued deposition of Albert J. Solnit on 5-13-75	
02-75	Filed State defendants supplemental memorandum of law in opposition to pltfs Foster Parents motion for declaratory and injunctive relief.	
01-75	Filed intervenor defendants' post trial memorandum.	
01-75	Filed deposition of deft. by Retta Friedman - dated 4-1-75 m/n	
03-75	Filed deposition of Dr. Shirley Jenkins on April 11, 1975.	
03-75	Filed deposition of Dr. Joel Kovel on April 2, 1975.	
03-75	Filed deposition of Eugene A. Weinstein, Ph.D. as a witness on March 18, 1975. m/n	
03-75	Filed deposition of Henry Grunebaum on April 10, 1975.	
03-75	Filed deposition of David Fanshel on April 8, 1975.	
03-75	Filed continued deposition of David Fanshel on May 12, 1975.	
09-75	Filed plaintiffs' reply memorandum.	
09-75	Filed examination of defts Mary Jane Brennan dated 4-9-75. m/n	
10-75	Filed Intervenor defendants post trial memorandum concerning Children in Foster Care.	
2-76	Fld Deposition of Joseph Goldstein taken on 4-1-75.	
2-76	Fld Opinion #41102....From 3 Judge Court....In sum,, therefore, we conclude that N.Y. Social Service Law S S 383(3) and 400, and N.Y.C.P.L.R. S 450.14, as presently operated, unduly infringe the constitutional rights of foster children. Defts are enjoined from removing any foster children with the certified class from the foster homes in which they have been placed unless and until they grant a pre removal hearing in accord with the principles set forth above. Of course, our decision today does not in any way limit the authority of the State to act summarily in emergency situations. Family Court Act S 1021..So Ordered....Lumbard, C.J. & Carter, J. rm	
2-76	Fld Dissenting Opinion #41104.....I would dismiss the compli.....Pollack, J. rm	3-25-76
-76	Fld Opinion #41103....In sum, the motions to certify a class of pltff foster parents, pltff foster children, and intervenor-defts. natural parents are granted. Intervenors' motion to amend their answer is granted to the extent it asserts affirmative defenses in ¶ 35 and the cross-claim, which are not affected, and intervenors' motion to join an add'l pty is granted. So Ordered....Carter, J. rm	

DATE	PROCEEDINGS
3-29-76	Fld Amended Opinion#4h10?.....In summ.,therefore, we conclude that N.Y. Soc. Service Law SS 383(2) AND 3)), AND N.Y.C.R.R. S 450.14,as presently operated, unduly infringe the constitutional rights of foster children. Defts are enjoined from removing any foster children in the certified class from the foster homes in which they have been placed unless and until they grant a pre-removal hearing in accord with teh principles set forthe above. Of course, our decision today does not in any way limit the authority of the State to act summarily in emergency situations. Family Court Act S 1021. Order to be taken on submission.....Lumbard, C.J. and Carter,J. mn
4-14-76	Fld Order & Judgment....N.Y. Soc. Services Law SS383(2) and 400, and N.Y.C.R.R. S 450.14 as presently applied are unconstitutional, in violation of the constitutional rights of foster children in the certified class....and defts are permanently enj. from removing or authorizing the removal of any foster children in the certified class from foster homes in which they have lived continously for more than one year, w/o notice and hearing at which the foster parents, the foster child and the biological parents may present any relevent inform. to the adv. decisionmaker charged with determining the advisability of such removal. .....etc....the effective date of this order and judgment shall be stayed for 30 days to permit application to a Justice of the Supreme Court of the U.S. for a further stay pending appeal to the Supreme Court of the U.S...All motions for rehearing are denied except that the clerk of the district court is directed to strike from the last page of the opinion the words:"Family Court Act S 1021." ....Lumbard, J.E., C.J. and Carter,J.----I dissent from the foregoing except paras#7 & 8....Pollack , J.....mn Judgment Entered 4-14-76-Clerk cnt 4-15
4-15-76	Fld Pltffs' Post hearing memo in opposition to the motion for summ judg etc.
4-15-76	Fld Intervenor Defts' Post Trial Memo.
4-15-76	Fld Pltff's Affdvt by Atty/ P. Bienstock in R: Exhibits.
5-11-76	Fld Order that Peter Bienstock is relieved as atty of record dor pltffs.and that notice of this s/d be made upon all atty of record and upon those representing the named pltffs' whether as next friend or guardian ad litem..Carter,J.
5-25-76	Fld Pltffs' Notice of Motion for an order substituting new counsel for pltff foster children.....ret 6-4-76-10AM Rm 318.
5-25-76	Fld Pltffs' Affdvt by M. R. Lowry in support of motion for new counsel for pltff foster children.
5-25-76	Fld Pltffs' Memorandum in support ofc pltff Foster Parents' motion for new counsel fr pltff Foster Children.
5-26-76	Fld True Copy of Order from Supreme Ct of the US...Ordered that the judgment of USDC for SD of NY fld 4-14-76...is stayed pending referral to and further order of the Court.....H. Rodak, Jr....mn
6-2-76	Fld Affirmation in support Pltffs. L. L. Futterweger, in opposition to motion pltff adult, and Court to remove Futterweger as atty for infant pltffs.
6-1-76	Fld Affdvt in opposition by L. G. Cora Jurgen to pltffs to remove H. Futterweger as counsel for children.
6-7-76	Fld defts Sharpe and Lavine's Affdvt in opposition to motion to substitute counsel. Fld L.J. Lefkowitz Atty Gen of State of N.Y. Affdvt in opposition to the motion by new atty for foster parents to remove the atty for the foster children.
6-10-76	Fld L.J. Lefkowitz Atty Gen of State of N.Y. Affdvt in Defts Sharpe and Lavine's Notice of Appeal to the Supreme Court of the U.S. from order and judgment ent 4-14-76.
6-10-76	Fld intervenor-defts' Notice of Appeal to Supreme Court of U.S...from judg. ent 4-14-76.
6-17-76	Fld Infant Pltffs, Costello and Gandy., Serrano and Wallengal etc Notice of Appeal to U.S. Supreme Ct from order granting cnt 4-14-76.

Cont'd on page 9

ATE	PROCEEDINGS
29-76	Fld Memo Def on his motion fld 5-25-76. Accordingly, I see no reason now to replace Ha. Buttenweiser or to supplement her efforts because the position she has taken conflicts with the holding of the majority of the 3-judge court. The motion is denied...SO Ordered....Carter,J. mn
6-76	Filed pltffs notice of appeal to the USCA from the Opinion & Order ent. 6-29-76, denying pltff foster parents' motion to substitute new counsel for pltff foster children & the class they represent or, in the alternative to appoint addt'l counsel to represent the rights & interest of pltff foster childrn as determined by the three judge court in its decision dtd 3-22-76. Copies mailed to:

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Louise Gans
Community Action for Legal Services
335 B'way, New York, N.Y. 10013

76	Fld Def Dumpson's notice of appeal to the Supreme Court of the U... from order & memorandum ent. on 6-29-76.
16-76	Fld Supreme Ct of the U.S. certification that appeal has been docketed 76-533.
16-76	Fld Supreme Ct of the U.S. certification that appeal has been docketed 76-532.
16-76	Fld Supreme Ct of the U.S. certification that appeal has been docketed 76-532.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By [signature]
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants.

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AMENDED COMPLAINT

Class Action

1. This is a class action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202 to protect and redress rights guaranteed by the Fourteenth Amendment. In this action, plaintiffs and members of their class seek a declaration that New York Social Services Law §§ 383 (2) and 400 on their face and as applied violate the due process and equal protection clauses of the Fourteenth Amendment and an injunction against their continued application, and a declaration that the procedures for removing children from foster

5. There are four sub-classes represented by plaintiffs. All of them involve foster families which have been together for more than one continuous year, and which are in jeopardy of being separated and the children moved elsewhere in violation of their rights to equal protection and due process of law, as guaranteed by the Fourteenth Amendment.

6. Plaintiff Madeline Smith represents the sub-class of foster parents who are under the supervision of authorized child-care agencies. Plaintiffs Ralph and Christiane Goldberg represent the sub-class of foster parents who are under the direct supervision of a public welfare district. Plaintiff Organization of Foster Families for Equality and Reform represents both of these sub-classes, which on information and belief contain well over a thousand members, viz., all those foster parents who have had continuous care and custody of foster children for more than one year, either through an authorized agency or under the direct supervision of a public welfare district.

7. Plaintiffs Danielle and Eric Gandy, who appear in this action by their foster mother and next friend Madeline Smith, represent the sub-class of foster children under the supervision of authorized child-care agencies, and who have lived in one foster home for more than one year. Plaintiff Rafael Serrano who appears in this action by his foster parents and next friends Ralph and Christiane Goldberg, represent the sub-class of foster children under the direct supervision of a public welfare district. Both of the sub-classes contain, on information and belief, well over a thousand members, viz., all those foster children who have lived in one foster home

for more than one year, either under the supervision of an authorized agency or under the direct supervision of a public welfare district.

8. The number of individuals in each of these sub-classes is too numerous to make joinder practicable.

9. Plaintiffs will fairly and adequately represent the interest of the class in the present action. All plaintiffs are represented by attorneys associated with the New York Civil Liberties Union, a privately funded organization, with resources and experience in the area of constitutional litigation.

10. Plaintiffs' claims are typical of the claims of the class. Plaintiffs Madeline Smith, Ralph and Christiane Goldberg, and O.F.F.E.R. represent all those foster parents who have taken homeless, dependent children who are in the custody of public welfare officials, either directly or through authorized agencies, into their homes, who have brought up these children for years, and who are in jeopardy of having these children summarily removed pursuant to statutes and a state regulation, New York Social Services Law §§ 383 (2) and 400, and 18 NYCRR 450.14, which violate their constitutional rights to due process and Equal protection of the law. Plaintiffs Eric and Danielle Gandy and Rafael Serrano represent all those dependent New York children who are the legal responsibility of public welfare officials, either directly or through authorized agencies, who have been placed in stable, loving

foster homes, and who are in jeopardy of losing what has become their family through the arbitrary, standardless procedures authorized by New York Social Services Law §§ 383 (2) and 400, and 18 NYCRR 450.14, in violation of their constitutional rights to due process and equal protection of the law.

11. There are questions of law and fact common to all members of class in this action, in that defendants Dumpson, Beine, Dall and O'Neill have the statutory authority to and do remove foster children from the homes of foster parents in violation of both of these groups' rights to due process and equal protection of the law as guaranteed by the Fourteenth Amendment.

12. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members and an adjudication with regard to plaintiffs' constitutional claims would as a practical matter be dispositive with regard to other members of the class. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Plaintiffs know of no interest of members of the class in individually controlling separate actions. Plaintiffs know of no difficulties likely to be encountered in the management of a class action.

PLAINTIFFS

13. The Organization of Foster Families for Equality and Reform is a downstate New York organization of foster parents with a membership of approximately 250 persons. It is a member of the New York state-wide coalition of parent organizations which includes over 2,000 persons. O.F.F.E.R. was organized to

provide forums for foster parents to discuss common problems with respect to their relationship with the public officials and child-care agency representatives under whose authorization they receive foster children, and to gather and present information with regard to foster parents' rights.

14. Plaintiff Madeline Smith is a 53-year-old widow who lives in East Elmhurst, New York. She became an approved foster parent under the supervision of Catholic Guardian Society of New York in 1969. On February 1, 1970, she took Eric and Danielle Gandy into her home as foster children, where they have lived and been cared for continually for the past four years.

15. Plaintiffs Eric Gandy, who is eight years old, and Danielle Gandy, who is six years old, appear in this action by their foster mother and next friend, Madeline Smith. Both Danielle and Eric were placed in the custody of the Commissioner of Social Services on April 26, 1968. They were placed in Mrs. Smith's home on February 1, 1970, by Catholic Guardian Society of New York, and have not seen their natural mother at least since that date. Both Danielle and Eric call Mrs. Smith "Mommy."

16. Plaintiffs Ralph and Christiane Goldberg own their own home in Brooklyn. Mr. Goldberg is a hospital administrator. As authorized foster parents directly under the supervision of the Bureau of Child Welfare, they took Rafael Serrano into their home on July 11, 1969, where he has lived as a member of their family for the past five years.

17. Plaintiff Rafael Serrano, who is 11 years old,

appears in this action by his foster parents and next friends, Ralph and Shirley Jane Goldberg. On information and belief, he has been in the custody of the Commissioner of Social Services since 1968, when his parents signed a voluntary consent for placement after an abuse report had been filed against them. He has lived with Mr. and Mrs. Goldberg longer than he has lived any place else in his life.

18. Defendant James Dumpson is the duly appointed Administrator of the Human Resources Administration of the City of New York and as such is responsible for the administration of the New York City welfare district. New York Social Services Law § 395 et seq. specifically mandates that the official in charge of the local public welfare district is responsible for all children within his district who are in need of care and assistance.

19. Defendant Elizabeth Deine is an agent of defendant Dumpson and was at the time this action was filed Acting Assistant Administrator of Special Services for Children, an agency within the New York City Human Resources Administration responsible for providing services for all children in need of care in New York. She is also Director of the Bureau of Child Welfare, a division within Special Services for Children.

20. Defendant Adolin Dall is an agent of defendants Dumpson and Deine and is Director of the Division of Inter-Agency Relationships of the Bureau of Child Welfare which, upon information and belief, is directly responsible for the supervision of all authorized child-care agencies which serve

New York City children.

21. Defendant James P. O'Neill is Executive Director of Catholic Guardian Society of New York, a child-care agency authorized by the New York State Board of Social Welfare to provide services for children and to receive children for placement from the public welfare district administrator. Upon information and belief, Catholic Guardian Society of New York receives over 90 percent of its funding from the City of New York, is subject to state and city regulations and supervision, and acts under color of state law.

STATEMENT OF CLAIM

Mrs. Smith and Eric and Danielle Gandy

22. Upon information and belief, in 1969, plaintiff Madeline Smith became approved as a foster parent by the Catholic Guardian Society of New York, a child-care agency operated by defendant O'Neill under the supervision of defendant Dumpson and his agents.

23. At that time, upon information and belief, Mrs. Smith told the Catholic Guardian Society social worker, Mrs. Armstrong, that she wanted foster children who had no family at all, because she would like to adopt them. Mrs. Smith told Mrs. Armstrong that she had arthritis, which made her unable to work, but she said, upon information and belief, that she was capable of caring for children and was anxious to do so because her own daughter had died.

24. Upon information and belief, Mrs. Armstrong told Mrs. Smith that Catholic Guardian Society had two children they

would like to place with her, Eric and Danielle Gandy. Upon information and belief, Mrs. Armstrong told her that only Danielle was adoptable because Eric was retarded, but that the agency was anxious to keep the children together because they were the only family each of them had. Mrs. Smith said she would take both children.

25. On February 1, 1970, Eric and Danielle Gandy went to live with Mrs. Smith, where they have lived ever since.

26. Upon information and belief, Eric and Danielle Gandy are legally free for adoption. Upon information and belief, Danielle has never seen her natural mother , Eric does not remember her, and both of them regard Mrs. Smith as their mother.

27. Upon information and belief, Mrs. Smith has repeatedly made known her desire to adopt the children to workers at the Catholic Guardian Society.

28. Upon information and belief, defendant O'Neill and his agents have arbitrarily decided to remove Eric and Danielle Gandy from Mrs. Smith's home. On information and belief, defendants Dumpson, Beine, Dall and their agents have approved defendant O'Neill's decision to remove Eric and Danielle Gandy from Mrs. Smith's home.

29. Upon information and belief, Mrs. Smith has been notified of this decision, but has not received any notice of the reasons upon which the decision has been based. Nor has Mrs. Smith been given an opportunity to challenge these reasons in a hearing.

30. Upon information and belief, Mrs. Dillon, an employee of Catholic Guardian Society and an agent of defendant O'Neill's, brought Mrs. Smith a letter dated March 29, 1974, a copy of which is annexed hereto as Exhibit A, notifying her that Eric and Danielle would be removed from her home on April 24, 1974. The only reason for the pending removal stated in the letter is: "To continue to plan for Eric and Danielle, it is now in their best interests to leave your home on or about April 24."

31. Upon information and belief, the letter given to Mrs. Smith is a printed form letter routinely used by defendant O'Neill as the only notice to foster parents of the pending removal of foster children from their foster homes. The only blanks to be filled in on the form are the names of the foster parents and the children, the date of the letter and the date on which the children are to be removed. The statement quoted in paragraph 30 is part of the printed form, with the exception of blanks for the children's names and the removal date.

32. Upon information and belief, the only opportunity for a hearing that has been afforded to Mrs. Smith was contained in the following statement in the form letter: "In the event that you wish to waive the ten days' notice usually given to a foster parent before removing a child just check this box, sign below, and return this letter to me. However, if you have serious questions about this plan, it is your right to request a conference with a public official. The Public Official will review with you the reasons for the decision; and you can give your reasons for requesting the conference."

33. Upon information and belief, the conference referred to in the letter does not satisfy the most minimal due process rights, in that there are no written standards or guidelines concerning the conference itself, there are no written standards or guidelines by which to judge the appropriateness of the agency's removal decision, the foster parent is not entitled to a written statement specifying the basis for the agency's decision, the foster parent is not entitled to confront and question those persons supplying the facts, if any, upon which the agency decision has been made, and the foster parent is not entitled to bring her own witnesses.

34. Upon information and belief, Mrs. Dillon brought Mrs. Smith the letter, told her to check a box and sign the letter, and told her that she had not waived any rights to a review of the agency's decision to remove the children. Upon information and belief, Mrs. Smith was denied even this legally insufficient conference since her alleged waiver of the conference was an uninformed waiver.

35. Upon information and belief, defendants O'Neill and his agents, and defendants Dumpson, Beine, and Dall have decided to and plan to remove Eric and Danielle Gandy permanently from Mrs. Smith's home on May 10, 1974.

36. Upon information and belief, the procedure followed by defendant O'Neill and his agents, with regard to notification to Mrs. Smith of the planned removal of her foster children is regularly followed by defendant O'Neill's agents with regard to other foster parents and children over whom they have control.

37. Upon information and belief, this procedure is followed and carried out with the full knowledge and cooperation of and acting in concert with and under the authority of defendants Dumpson, Beinc, and Dall and their agents.

38. All actions of defendant O'Neill and his agents alleged in this complaint are and have been carried out under color of state law. Catholic Guardian Society of New York, of which defendant O'Neill is Executive Director, is a child-care agency authorized, approved and regulated by New York state law, and supervised by state and city public officials. Upon information and belief, it receives over 90 percent of its funding from the City of New York, and acts as an agent of the city with regard to those children including Eric and Danielle Gandy, whom the city has referred to Catholic Guardian Society for placement. Upon information and belief, a substantial portion of the money Catholic Guardian Society receives from the City of New York is reimbursed to the city from the federal government as Aid to Families of Dependent Children payments under Title IV-A of the Social Security Act.

39. Upon information and belief, this procedure, or procedures substantially similar, are followed and carried out by other child-care agencies under the control and supervision of defendants Dumpson, Beinc, and Dall and their agents with the full knowledge and cooperation of said defendants.

40. Upon information and belief, notification of the availability of an administrative conference, held pursuant to 18 NYCRR 450.14, is frequently carried out by defendant O'Neill and waivers obtained, without said waivers being informed

waivers, and without the notified foster parents being fully informed of and aware of their rights.

41. Upon information and belief, notification of the availability of an administrative conference held pursuant to 18 NYCRR 450.14 is made in a substantially similar way by other child-care agencies under the control and supervision of defendants Dumpson, Beine, and Dall and their agents, and with their full knowledge and cooperation.

Mr. and Mrs. Goldberg and Rafael Serrano

42. Mr. and Mrs. Goldberg are authorized foster parents under the direct supervision of defendants Dumpson and Beine. They took Rafael Serrano into their home on July 11, 1969, when he was six years old.

43. On information and belief, Rafael had lived in several other homes before he came to live with Mr. and Mrs. Goldberg in 1969, and had been severely abused by his parents during the time he lived with them.

44. Upon information and belief, when Rafael was placed with Mr. and Mrs. Goldberg by the Bureau of Child Welfare in 1969, the worker told them that he was brain damaged, retarded and hyperactive. Upon information and belief, they were told that if they didn't take the six-year-old boy at that time, the Bureau of Child Welfare would place him in a state hospital.

45. Upon information and belief, when Rafael first came to live with Mr. and Mrs. Goldberg, he was a very distressed, unhappy child who threatened to tear apart their home and their

own three-year-old daughter. A doctor who saw Rafael at that time described him as being paralyzed by anxiety.

46. Upon information and belief, the Bureau of Child Welfare worker told Mr. and Mrs. Goldberg shortly after they took Rafael that they should not feel bad about returning him to the agency since his record showed an inability to adjust to a family setting. Upon information and belief, the agency worker said the alternative to the Goldbergs' home for Rafael would be an institution.

47. Rafael has lived with Mr. and Mrs. Goldberg and their daughter for the last five years as a member of their family. He is now doing well in school, and has made friends in their community.

48. Mr. and Mrs. Goldberg have been commended repeatedly by employees and agents of defendants Dumpson and Beinc for doing an admirable job in raising Rafael.

49. Rafael's parents have not seen the boy in well over a year and, upon information and belief, have made no attempts to have their son returned to them. Upon information and belief, all of their six children are in foster care and the Bureau of Child Welfare has recommended adoption for two of them.

50. Upon information and belief, the Bureau of Child Welfare worker in charge of Rafael's case, Robert Tobing, has recommended that Rafael be taken from his home with Mr. and Mrs. Goldberg within the next few months and given to an aunt whom Rafael has visited only once.

51. Upon information and belief, the aunt to whom the agency plans to give Rafael does not want to take him from the

Goldbergs' home and does not want to bring him up.

52. Upon information and belief, Mr. and Mrs. Goldberg have not been notified directly of the Bureau of Child Welfare's decision to remove Rafael from their home, nor do they know any reason why such an action should be taken.

53. Upon information and belief, the Bureau of Child Welfare is working toward removing Rafael from his home with Mr. and Mrs. Goldberg, by attempting to set up visits between Rafael and his aunt so they can get to know each other before Rafael is to be moved. Such visits in the context of a planned move are subjecting Rafael and Mr. and Mrs. Goldberg to severe anxiety and uncertainty.

54. Upon information and belief, these actions of defendants Dumpson, Beine and their agents, to begin to effectuate a plan to remove a child from a home he has made with his foster parents, without adequate notice of the planned removal and without stating the reasons for such a removal, are carried out in a substantially similar way with regard to other foster parents and children under the direct supervision and control of the Bureau of Child Welfare, and with the full knowledge and cooperation of defendants Dumpson and Beine.

55. Under 18 NYCRR 450.14, Mr. and Mrs. Goldberg are only entitled to notification that Rafael is to be removed from their home 10 days prior to the date of the actual removal.

56. When they are thus notified, they have a right to request a conference with an agent and employee of the Bureau of Child Welfare, prior to the removal, pursuant to 18 NYCRR 450.14.

57. Upon information and belief, the costs of the foster care program under the direct supervision of the Bureau of Child Welfare, in which Mr. and Mrs. Goldberg are authorized foster parents, are substantially reimbursed by the federal government as Aid to Families of Dependent Children payments under Title IV-A of the Social Security Act.

New York City Revised Procedure

58. Subsequent to the filing of this action, defendant Dumpson and his agents promulgated a document entitled "Human Resources Administration Inter-Office Memorandum, Subject: Administrative Removal of Foster Children," dated June 25, 1974, setting forth procedural changes with regard to the removal of New York City foster children from foster homes under certain circumstances.

CAUSES OF ACTION

59. The notification procedure described above in paragraphs 29 through 41 violates the right of plaintiff Smith and foster parents who are members of her class not to be deprived without due process of law of the fundamental right to establish a home and bring up children and to enjoy those privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the Fourteenth Amendment.

60. The notification procedure contained within the New York City procedure referred to in paragraph 58 above violates the rights of plaintiffs Smith and Ralph and Christine

Goldberg and members of their class not to be deprived without due process of law of the fundamental right to establish a home and bring up children and to enjoy those privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the Fourteenth Amendment.

61. The plan and the attempts by agents of defendants Dumpson and Beine to begin implementation of their decision to remove Rafael Serrano from his home with Mr. and Mrs. Goldberg, prior to notification that the child is to be removed, violates the right of plaintiffs Ralph and Christiane Goldberg not to be deprived without due process of law of the fundamental right to establish a home and bring up children and to enjoy those privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the Fourteenth Amendment.

62. New York Social Services Law § 383 (2), which authorizes defendant O'Neill and his agents, with the knowledge, authorization and encouragement of defendants Dumpson, Beine and Dall, to remove Eric and Danielle Gandy from Mrs. Smith's home and which authorizes defendants Dumpson and his agents to remove Rafael Serrano from Ralph and Christiane Goldberg's home provides:

> "The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized

agency may in its discretion remove such child from the home where placed or boarded."

63. Said statute is unconstitutionally vague and fails to set standards in violation of the rights of plaintiffs Smith and Ralph and Christiane Goldberg and foster parent members of their class not to be deprived of their fundamental rights to establish a home, bring up children and to enjoy those privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the due process guarantee of the Fourteenth Amendment.

64. Said statute is unconstitutionally vague and fails to set standards in violation of the rights of plaintiffs Eric and Danielle Gandy and Rafael Serrano and other foster children in their class to those fundamental rights and privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the due process guarantee of the Fourteenth Amendment.

65. The statute, New York Social Services Law § 400, which authorized defendants Dumpson and Beine and their agents to remove Rafael Serrano from the home of Ralph and Christiane Goldberg, provides:

> "When any child shall have been placed in an institution or in a family home by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.

> "Any person aggrieved by such decision of the commissioner of public welfare of city welfare officer may appeal to the department, which upon receipt of the appeal shall review the case, shall give the person making the appeal an opportunity for a fair hearing thereon and within thirty days render its decision. The department may also, on its own motions, review any such decision made by the public welfare official. The department may make such additional investigation as it may deem necessary. All decisions of the department shall be binding upon the public welfare district involved and shall be complied with by the public welfare officials thereof."

66. Said statute is unconstitutionally vague and fails to set standards in violation of the rights of plaintiffs Ralph and Christiane Goldberg and foster parent members of their class not to be deprived of their fundamental rights to establish a home, bring up children and to enjoy those privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the due process guarantee of the Fourteenth Amendment.

67. Said statute is unconstitutionally vague and fails to set standards in violation of the rights of plaintiff Rafael Serrano and members of his class to those fundamental rights and privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the due process guarantee of the Fourteenth Amendment.

68. The facial constitutional infirmity of New York Social Services Law §§ 383(a) and 400 is further compounded by the absence of any state regulations which set standards by

which these statutes are to be applied, in violation of the due process rights of plaintiffs and members of their class.

69. The facial constitutional infirmity of Social Services Law § 383 (2) is further compounded by the fact that this unfettered discretion, which is exercised in the absence of any state regulations setting standards, is given to employees and agents of voluntary child-care agencies, who act under color of state law but are not under the control of public officials, in violation of the right of plaintiffs Madeline Smith and Eric and Danielle Gandy and members of their class to due process and equal protection of the law.

70. New York Social Services Law § 400, which provides a foster parent aggrieved by a decision to remove a foster child from his or her home with the right to a fair hearing subsequent to the removal of the child, extends only to foster parents under the direct supervision of a public welfare official. On its face, this statute deprives plaintiffs Madeline Smith and Eric and Danielle Gandy and members of their class, who are foster parents and foster children under the direct supervision of a voluntary child-care agency, of equal protection of the law in violation of their constitutional rights.

71. On its face, 18 NYCRR 450.14(a) (b) and (c) insofar as it provides an administrative conference without mandating even minimal due process safeguards and standards prior to the removal of foster children from foster homes,

violates the constitutional rights of plaintiffs Madeline Smith and Eric and Danielle Gandy, and Ralph and Christiane Goldberg, and members of their class not to be deprived of liberty or fundamental rights without due process of law.

72. As applied by defendants, 18 NYCRR 450.14 (a) (b) and (c) insofar as it provides an administrative conference prior to the removal of foster children from foster homes without constitutionally adequate due process safeguards, violates the constitutional rights of plaintiffs and members of their class not to be deprived of liberty or fundamental rights without due process of law.

73. The internal procedure enacted by defendants Dumpson and his agents, dated June 25, 1974, and referred to in paragraph 58 above, is unconstitutionally vague, fails to set standards, and does not provide constitutionally adequate due process safeguards prior to the removal of foster children from foster homes, in violation of the rights of plaintiffs and members of their class not to be deprived of liberty or fundamental rights without due process of law.

74. New York Social Services Law § 400 and 18 NYCRR 450.14(c) provide that a foster family aggrieved by a decision to remove a child from its home may request a fair hearing to review the decision subsequent to the time the child is actually removed from the home.

75. The absence of a fair hearing prior to the termination of participation in a program funded by the federal government, under its Aid to Families of Dependent Children, while other recipients and beneficiaries of federal funds under

Aid to Families of Dependent Children are entitled to a fair hearing prior to such a termination, under 18 NYCRR 358.8, violates the rights of plaintiff foster families and foster children to equal protection of the law as guaranteed by the Fourteenth Amendment.

76. The absence of any hearing procedure which satisfies due process standards prior to the removal of foster children from homes in which they have lived for more than a year violates the rights of Eric and Danielle Gandy and Rafael Serrano and members of their class not to be subjected to irreparable harm and denied liberty and fundamental rights without due process of law as guaranteed by the Fourteenth Amendment.

77. The absence of any hearing procedure which satisfies due process standards prior to the removal of foster children from homes in which they have lived for more than a year violates the rights of Madeline Smith and Ralph and Christiane Goldberg and members of their class not to be subjected to irreparable harm and denied liberty and fundamental rights without due process of law as guaranteed by the Fourteenth Amendment.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

(a) Grant a temporary restraining order restraining defendants O'Neill, Dumpson, Beine and Dahl from removing Eric

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and Danielle Gandy from the home of Mrs. Madeline Smith;

(b) Convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284;

(c) Enter a declaratory judgment that New York Social Services Law § 383(2) is unconstitutional on its face and as applied as a violation of the due process clause of the Fourteenth Amendment;

(d) Enter a declaratory judgment that New York Social Services Law § 400 is unconstitutional on its face and as applied as a violation of the due process and equal protection clauses of the Fourteenth Amendment;

(e) Enter a declaratory judgment that the practice of defendants Dumpson and Beine and their agents of failing to provide a due process hearing prior to the removal of children from foster homes in which they have lived continuously for over one year violates the rights of foster parents and children to due process and equal protection of the law;

(f) Enter a declaratory judgment that 18 NYCRR 450.14 is unconstitutional on its face and as applied as a violation of the due process clause of the Fourteenth Amendment;

(g) Enter a declaratory judgment that the New York City Human Resources Administration internal procedure for removing foster children from foster homes is unconstitutional on its face and as applied as a violation of the due process clause of the Fourteenth Amendment;

(h) Preliminarily and permanently enjoin defendants from removing foster children from foster homes in which they

have lived continuously for a period of over one year pursuant to New York Social Services Law § 383(2);

(i) Preliminarily and permanently enjoin defendants from removing foster children from foster homes in which they have lived continuously for a period of over one year pursuant to 18 NYCRR 450.14;

(j) Preliminarily and permanently enjoin defendants from removing foster children from foster homes in which they have lived continuously for a period of over one year pursuant to the New York City Human Resources Administration internal procedure;

(k) Preliminarily and permanently enjoin defendants from removing foster children from foster homes in which they have lived continuously for a period of over one year without the due process safeguards of adequate and specific notice and a prior hearing which satisfy the due process requirements of the Fourteenth Amendment;

(l) Such other and further relief as this Court deems just and proper.

Respectfully submitted,

Marcia Robinson Lowry

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Catholic Guardian Society

1011 FIRST AVENUE
NEW YORK, NEW YORK 10022

Telephone: 371-1000

September 21, 1973

Telephone # 478-0945
Date: 3/29/74
Re: Enid Danielle Conley

Mrs. Madeline Smith
93-15 101st Street
East Elmhurst, N.Y.

Dear Mrs. Smith

The care and attention you have given to the foster child(ren) in your home is greatly appreciated. This has been a service not only to the child, but to your community.

To continue to plan for Enid Danielle, it is now in (~~his~~) (~~her~~) (their) best interests to leave your home on or about April 24. Should you desire any additional information, please feel free to contact me.

In the event that you wish to waive the ten day's notice usually given to a foster parent before removing a child just check this box ☑, sign below, and return this letter to me.

However, if you have serious questions about this plan, it is your right to request a conference with a public official. The Public Official will review with you the reasons for the decision; and you may give your reasons for requesting the conference. If you wish, you may bring a representative to the conference. Please let me know immediately if you wish me to arrange such a conference for you and whether you plan to bring a representative. Otherwise, I shall assume you are in agreement that the plan should be carried out.

Once again, may we thank you for your service to the New York City children.

Sincerely yours,

Jane Ann Brown
Caseworker

The parent's signature if willing to waive 10 day notice.

Madeline Smith

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AUG 19 1974
S.D. OF N.Y.

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,

Plaintiffs,

-against-

JAMES DUMPSON, et al.,

Defendants.

74 Civ. 2010

Judge Robert L. Carter

ORDER

MICROFILM
AUG 19 1974

This cause having come on to be heard on plaintiffs' motion pursuant to 28 U.S.C. §§ 2281 and 2284 for the convening of a three-judge court, plaintiffs' motion to join parties pursuant to Fed. R. Civ. P. 21, plaintiffs' motion for a temporary restraining order pursuant to 28 U.S.C. § 2284(3), and the motion of Naomi Rodriguez et al. to intervene in this action pursuant to Fed. R. Civ. P. 24(a) and (b), and papers having been submitted and a hearing having been held on all the motions listed above on August 5, 1974, before the Hon. Robert L. Carter, it is

ORDERED that plaintiffs' motion for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 be and hereby is granted, and it is further

ORDERED that plaintiffs' motion to join Dorothy and George Lhotan, and Cheryl, Patricia, Cynthia and Cathleen Wallace as parties plaintiff, and Joseph D'Elia, Commissioner of the Nassau County Department of Social Services, Bernard Shapiro, Executive Director of the New York State Board of

Social Welfare, and Abe Lavine, Commissioner of the New York State Department of Social Services as parties defendant be and hereby is granted, and further

The court having made a finding that irreparable injury will result to Cheryl, Patricia, Cynthia and Cathleen Wallace through the disruption in their lives caused by their removal from the home of Dorothy and George Lhotan, and in order to maintain the status quo with regard to these children and their foster parents, it is further

ORDERED that defendant Joseph D'Elia be restrained pursuant to 28 U.S.C. § 2284(3) from removing Cheryl, Patricia, Cynthia and Cathleen Wallace from the home of Dorothy and George Lhotan or in any way interfering with or interrupting their stay with these foster parents pending a hearing before the three-judge court, and a determination of plaintiffs' motion for a preliminary injunction, and it is further

ORDERED that the motion of Naomi Rodriguez, Rosa Diaz, Mary Robins and Dorothy Nelson Shabazz to intervene as defendants in this action pursuant to Fed. R. Civ. P. 24(a) and (b) is granted solely for the purposes of litigating the issues and causes of action contained in Plaintiffs' Second Amended Complaint, and it is further

ORDERED that the cross claims of Naomi Rodriguez, Rosa Diaz, Mary Robins, and Dorothy Nelson Shabazz asserted in Intervenor Defendants' Answer and Cross Claim are stricken and the intervenor defendants' cross claims are disallowed.

Dated: New York, New York
August 15, 1974

Robert L. Carter
United States District Judge

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By M. Harrison
Deputy Clerk

POINT IV

SINCE THE INTERESTS OF PLAINTIFF FOSTER PARENT AND PLAINTIFF FOSTER CHILD ARE ANTAGONISTIC THE CLASS FAILS TO MEET THE REQUIREMENTS OF RULE 23 (a) (4)

FRCP 23 (a) (4) allows "one or more members of a class" to "sue or be sued as representative parties on behalf of all only if...(4) the representative parties will fairly and adequately protect the interests of the class."

The foster parent plaintiffs in this action purport to represent both the sub-classes of foster parents and, as next friends of the foster children living in their homes, the sub-classes of foster children. (Second Amended complaint #7.)

"As a matter of policy, it should not be presumed that any party to an action which purports to involve the interests of a child as well as the interests of that party, can alone be a fair and adequate representative of child in that action. The law presumes that a child's parents are generally best suited to represent and safeguard his interests. That presumption, however, should not prevail,... once the child's placement becomes the subject of a dispute between parents which they are unable to resolve without resort to the court. ...That presumption should not prevail ...when the state challenges their fitness to remain parents. Nor should it be presumed...that the state represents the interests of the child.

Its policies or practices may conflict with those of the child...Even child care agencies which are delegated responsibility for safeguarding the welfare of children often have conflicts of interests between their need to safeguard some agency policy and the needs of the specific child to be placed. In none of these proceedings does anyone have a conflict-free interest in representing the child." Goldstein, Freud and Solnit, Beyond the Best Interest of the child pp. 65, 66, supra.

See also Doe v Norton, 365 F. Supp. 65 (D. Conn, 1973), in which unwed mothers sought to represent the class of unwed mothers of illegitimate children, allegedly eligible to receive welfare benefits under the AFDC program of the Social Security Act of 1935 and their children. The court held that since some of the interests urged by the mothers conflicted with the interests of the children in several respects, they did not meet the adequacy of representation requirement of Rule 23 (a) (4).

If such a presumption as to the adequacy of representation of a child's interests by another interested party is invalid in the case of an individual action involving an individual child, it raises at least as many difficulties in this case, where, if the purported sub-classes of foster children are classes at all, they contain children with a multiplicity of interests. Some of the children, for

instance, may have established the firm ties with their foster parents which plaintiffs allege to be typical of their purported class; some may be strongly attached to their own parents and suffer daily anxiety and grief at the continued separation; some, attached to neither foster nor natural parents, may need quick transfer to a more suitable foster environment. The permutations of the children's emotional needs and legal interests are many.

Plaintiff foster parents, on the other hand, have a single interest, the retention of the foster children in their homes. It is to this end that they are seeking the declaration of a new constitutional right, and claiming the procedural due process which defendant's alleged interference with that claimed right requires.

Common sense dictates, and authorities support, the conclusion that the interest of foster parents in having foster children in their homes is not always co-extensive with the interests of the children. "It has long been recognized that applicants seek foster parenthood at a time when they feel some need which is not satisfied by their current family inter-relationships...[T]he motivation may be primarily an expression of narcissistically oriented needs, which leaves the applicants with a sense of emptiness in which the need to receive heavily outweighs the giving capacities characteristic of maturity." Kleine & OVerstreet, Foster Care of Children: Nurture and Treatment, Columbia

University Press, New York, London 1972, p.241. In sum, the right claimed by foster-parent plaintiffs "to establish a home and bring up children," even assuming that it attaches to the contractual status of foster parent, is not necessarily co-extensive with the undefined "fundamental rights and privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the due process guarantee of the Fourteenth Amentment" asserted by foster-children plaintiffs.

Where the purported representative of a class has interests which are not co-extensive and consistent with the members of the class, and there is existing or potential conflict of the purported representative's interests and those of the class, the requirement under Rule 23(a) that the representative "will fairly and adequately protect the interest of the class" is not met. (Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26 (S.D.N.Y. 1972); Troup v McCart, 238 F.2d 289 (5th Cir. 1956.) Thus the purported representation of the purported sub-classes of foster children by named foster parent plaintiffs does not satisfy Rule 23(a)(4), and the motion for a class action should be dismissed as to the sub-classes of foster children.

However, the court may well feel that some representation of children whose foster parents are plaintiffs in this action would be desirable. In that event, the multiplicity of their interests can best be represented by allow-

ing defendant natural parents to amend their answer so that they are also express representatives of the children. Such a procedure will encourage the vigorous advocacy of every facet of the children's complex interests, and will facilitate a final disposition which will do justice to their needs.

In the alternative, if the children are to be represented, the court may wish to appoint an independent law guardian for the purpose. Cf In re Gault, 387 US 1(1967) In individual actions in which a child has an interest, such a procedure is recommended by several authorities. See, e.g., Goldstein, et al. supra, pp. 66-67. Ira Glasser, Executive Director of the New York Civil Liberties Union also urges independent representation of the child whenever there is a conflict over its custody, "...for a very simple reason, and that is the interests of the parents are not the same as the child's." (Glasser, "Who Speaks For Me?" The Right to Representation; Proceedings of the New York State Conference on Children's Rights, 1974.)

There is, however, an inherent difficulty in the representation of the children in a civil action. Determining the interest of even a specific child in a specific situation depends at least in part on guesswork. An adult client says what he wants; his attorney acts in an effort to achieve that desire. A child does not always know and cannot always

articulate what he wants. His law guardian must decide, on the basis of several criteria, and that decision may be mistaken. In a case such as this, in which many children have many interests, the chance that a single representative may mistakenly pre-determine the children's interests is multiplied many times. For this reason, if the children are to appear in this suit, we suggest that a single law guardian for the childrens' interests would be inferior to the multiple representation argued for above.

However, appointment of a competent and knowledgeable law guardian would still be far more conducive to a realistic and unbiased determination of the justice of the claims in this siut vis-a-vis the children than would be its present posture; the purported representation of a widely varied class of children by unrelated adults who have their own, divergent, interests, at issue.

UNITED STATES DISTRICT COURT
CHAMBERS OF
JUDGE ROBERT L. CARTER
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

October 29, 1974

Marcia Robinson Lowry, Esq.
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

Marttie Louis Thompson, Esq.
Community Action for Legal Services, Inc.
335 Broadway
New York, New York 10007

Adrian Burke, Esq.
Corporation Counsel
Municipal Building
New York, New York 10007

John F. O'Shaughnessy, Esq.
County Attorney of Nassau County
Nassau County Executive Building
West Street
Mineola, New York 11501

Louis J. Lefkowitz, Esq.
Two World Trade Center
New York, New York 10049

Re: Organization of Foster Families, et al. v. James Dumpson, et al. -74 Civ. 2010

Gentlemen:

On Friday, October 25, I met with counsel and indicated that it was my intention to appoint Miss Helen L. Butterwieser as counsel for the children in the above entitled case. I indicated we came to that conclusion because of the possibility of a conflict of interest between the foster parents and the children and therefore felt that independent counsel for the children was necessary. At that time counsel

for the plaintiff advised that the named minors in the case, or at least some of them, were not opposed to her representing them, and has submitted to me an affidavit by Cheryl Wallace to that effect. This case, however, is being brought on behalf of a class and it may not be possible for any of the minors to waive the rights of the class they represent to have independent counsel.

Counsel for the plaintiff also indicated during that conference that she would prefer to remain counsel for the children. I have studied the plaintiffs' pleadings and their thrust is essentially to protect the rights of the foster parents. Indeed, it was because of this posture of the pleadings that we felt it essential that the children have independent counsel. The tentative decision to appoint Miss Buttenwieser is now made final. Miss Buttenwieser has agreed to accept the assignment. I am asking all counsel to serve all papers filed on her at once:

Helen L. Buttenwieser, Esq.
575 Madison Avenue
New York, New York 10022
Telephone: (212) 826-1600.

Miss Buttenwieser will have until the close of the business day on November 22 to file any answering papers that she deems necessary in the case.

After consultation with Judge Lumbard and Judge Pollack, we will set a new date for the hearing and I will so advise you.

Sincerely yours,

Robert L. Carter
by RYP

cc: Honorable J. Edward Lumbard
Honorable Milton Pollack
Helen L. Buttenwieser, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,	
Plaintiffs,	74 Civ. 2010 RLC
-against-	
JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,	ORDER TO SHOW CAUSE
Defendants.	

Upon the annexed affidavits of Marcia Robinson Lowry and Dr. Kenneth Clark, and the accompanying Memorandum of Law, it is

ORDERED that all other parties to this action, by counsel, appear at a motion term of this Court, to be held in Room 12[illegible] at the United States Courthouse, Foley Square, New York, New York, at [illegible] o'clock in the [illegible]noon, or as soon thereafter as counsel may be heard, for a hearing on plaintiffs' motion for

an order, pursuant to Rule 17(c), Federal Rules of Civil Procedure, continuing counsel to the Children's Rights Project of the New York Civil Liberties Union (i.e., Marcia Robinson Lowry and Peter Bienstock, Esqs.) as counsel for the plaintiff foster children and ordering plaintiff foster parents to collectively secure substitute counsel, or, in the alternative, for an order, pursuant to Rule 17(c), Federal Rules of Civil Procedure, appointing Dr. Kenneth Clark as guardian ad litem to the plaintiff foster children and deferring the question of substitution of counsel for plaintiffs until said guardian ad litem can make an independent evaluation and select counsel for the plaintiff foster children who will, in the judgment of the guardian ad litem, best put forth and protect the interests and rights of the plaintiff foster children, and it is further

ORDERED that personal service of a true copy of this order, the annexed affidavits and accompanying Memorandum of Law on counsel for all parties on or before November 8, 1974, at 12 noon (with the exception of defendant D'Elia, Commissioner of the Nassau County Department of Social Services, who shall be served forthwith by mail), shall constitute due and sufficient service thereof.

s/ Robert L. Carter,
United States District Judge

Dated: New York, New York
November 7, 1974

Issued at 10 05
AM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,

Plaintiffs,

-against-

JAMES DUMPSON, et al.,

Defendants.

74 Civ. 2010 RLC

AFFIDAVIT

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARCIA ROBINSON LOWRY, being duly sworn, deposes and says:

1. I am an attorney in the above-captioned action, and Director of the Children's Rights Project of the New York Civil Liberties Union.

2. I first met Madeline Smith in May, 1974, when she came to my office with Eric and Danielle Gandy. She told me at that time that Catholic Guardian Society was planning to remove Eric and Danielle from her home immediately.

3. I told her I would only represent her if I determined that the children wanted to stay with her, and that their interests would be served by a full due process hearing prior to the removal of the children from her home. I also told her that, if at any time during the litigation, a conflict developed between her interests and those of the children, that I would have to withdraw as her counsel and represent only the children.

4. She told me that was acceptable to her, and that all she was concerned about was having someone impartial evaluate what was best for the children. She told me that an agency worker had indicated to her that Eric and Danielle might be separated and that Eric might be placed in some kind of institution for retarded children. She told me that Eric was a little slow but that she didn't think he was retarded, and she thought it would destroy Eric to be separated from his sister and from her.

5. I spoke privately to Eric and Danielle. Danielle, who is six, did not understand that there was anything serious going on but said that she liked living with her mother, which is what she calls Mrs. Smith.

6. Eric, who is nine, told me that he liked living with Mrs. Smith because she wasn't "a mommy with a strap" like his other mother.

7. I told both of the children that I would agree to be their lawyer.

8. Subsequent to that interview, I asked a trained social worker with a master's degree in social work and experience working with families to visit Mrs. Smith's home. I did so because Danielle and Eric are young children and I wanted to have a careful, professional evaluation of their home situation.

9. The social worker visited Mrs. Smith on several occasions, and spent a total of more than five hours with her.

The social worker reported to me that Mrs. Smith was fully capable of caring for the children, and had a great affection for the children, which they reciprocated.

10. Shortly after the filing of this lawsuit, I was contacted by Ralph Goldberg. On May 14, 1974, he came to my office with his wife, Christiane, and their foster child, Rafael Serrano, who is eleven.

11. I explained to Mr. and Mrs. Goldberg that my concern was Rafael's welfare, that I considered him my primary client, and that if there were to be a conflict of interest at any point, I would represent Rafael and withdraw as their attorney.

12. I spoke to Rafael privately about how he felt about living with the Goldbergs, and how he felt about seeing his biological family. He told me he didn't mind seeing his sisters and brothers and his aunt, but he didn't want to visit his aunt if he was going to have to go live with her.

13. I explained to him that I was willing to go into court for him and tell the court that he should have a right to express his views before anyone made a decision to have him live with his aunt, or leave the Goldberg home. We talked about what going to court meant and Rafael said he wanted me to go to court for him.

14. On July 3, 1974, Dorothy and George Lhotan and Cheryl, Patricia, Cynthia and Cathleen Wallace came to my office. Mr. and Mrs. Lhotan told me that they had received notification from the Nassau County Children's Bureau that all four girls were to be removed from their home on July 9, 1974.

15. I spoke privately to the four girls about how they felt about leaving the Lhotan home. The girls are twelve, eleven, nine and eight years old.

16. The girls told me that they were very happy being together and being with the Lhotans, and that if they were forced to leave the Lhotan home, they would run away from wherever they were.

17. I asked the girls whether anyone from the Nassau County Children's Bureau had ever talked to them about where they wanted to live. They told me that no one had and that they thought that failure to even ask what their feelings were was not right.

18. I explained to them that I was already in court asking that a hearing be required before children could be moved from a foster home, and that I was willing to represent them if they wanted me to. They said they did.

19. I explained to Cheryl, who is the oldest of the children, what an affidavit was and she dictated most of her affidavit to my secretary. (See affidavit of Cheryl Wallace, sworn to on July 3, 1974, and previously filed in this action.)

20. Subsequent to my discussion with the Wallace girls, I had them seen by a psychiatrist, Dr. Marie Friedman. On the basis of her examination, Dr. Friedman told me that the girls were all of above-average intelligence, were fully aware of what was happening with regard to their possible removal from the Lhotan home, and were very sure that they wanted to stay together and in the Lhotan home.

21. All of the adult clients in this case had been advised by me on several occasions (see affidavits annexed hereto as Exhibit B) that if the court should ever find that my representation

of both foster parents and foster children presented a possible conflict, I would withdraw as attorney for the foster parents. They all agreed with that condition of my representation.

22. I had already spoken to the foster parents specifically with regard to this issue prior to the time the question of separate representation was raised before Judge Carter on August 5, 1974, by Elliot Hoffman, the attorney for the New York City defendants.

23. When Judge Carter indicated that he thought the issue went to and should be considered along with the merits of plaintiffs' claims, and Mr. Hoffman indicated that he might make a motion with regard to the question, I decided to postpone any action with regard to withdrawal and substitution of counsel until it became appropriate.

24. My study of the Canons of Ethics indicates that an attorney may represent multiple parties so long as there is no conflict of interests, and that at the point that a conflict arises the attorney must withdraw so as to represent only those parties whose interests do not conflict.

25. My representation of the foster parents and the foster children together was initially based on my professional evaluation of the issues and my conclusion that no conflict of interest existed.

26. As I stated to the court at the conference in chambers on October 25, 1974, I am willing to withdraw from my representation of the foster parents and represent only the foster children.

27. The court, in its letter dated October 29, 1974, has disqualified me as attorney for the seven children I represent.

28. The removal of an attorney over his or her objection is usually done only after a finding of gross incompetence or a violation of the Canons of the Code of Professional Responsibility. To my knowledge, no examination or hearing has been held with regard to this issue, and no such finding has been made against me.

29. Furthermore, the court has appointed new counsel for these children without consulting with these children, their next friends or their present counsel, and without a full inquiry with regard to whether the substituted counsel, Helen Buttenwieser, herself has any conflict of interest or appearance of conflict of interest with regard to the case.

30. I feel it is my duty to call to the court's attention the fact that, upon information and belief, Ms. Buttenwieser regularly represents or has represented at least one major child-care agency, the Jewish Child Care Association.

31. Since the thrust of the present litigation is to assert foster children's rights to due process review of the presently unquestioned discretion of the very voluntary child-care agencies which Ms. Buttenwieser represents, Ms. Buttenwieser appears to have a conflict of interest with regard to representing foster children asserting adversary interests against these agencies. Furthermore, in telephone conversations with Ms. Buttenwieser after the case was filed, Ms. Buttenwieser indicated to me that she doubted whether such litigation was necessary.

32. Upon information and belief, Ms. Buttenwieser has stated that she was skeptical as to whether the present litigation would further children's rights and indicated that she felt that the due process rights of children were adequately protected by existing state laws and procedures.

33. If the court is concerned about the competence of these children to choose their own counsel, particularly in view of the fact that they may be representing a class, it would seem appropriate to appoint a guardian ad litem who could stand between the children and any attorney to see that the children's interests were being independently represented. Your deponent urges that this court appoint Dr. Kenneth Clark as guardian ad litem. After discussing this case with the named plaintiff foster children, Dr. Clark has expressed willingness to assume that role (see affidavit of Dr. Kenneth Clark attached hereto).

34. The New York Civil Liberties Union initially approached Dr. Clark concerning assuming the role of court-appointed guardian ad litem. However, your deponent believes that Dr. Clark is a person uniquely qualified to make a truly independent judgment concerning the question of counsel to best represent the plaintiff foster children, and is completely willing to abide by any decision Dr. Clark, as guardian, would make.

35. The appointment of any other lawyer, in place of the lawyer originally representing the children, will not satisfy the question of whether the children are competent to decide by whom they should be represented, if the court is concerned about that issue.

36. Therefore, your deponent respectfully urges this court to continue me and the Children's Rights Project as counsel to the plaintiff foster children, and to order plaintiff foster parents to obtain independent counsel, or, in the alternative, to appoint Dr. Kenneth Clark as guardian ad litem to the plaintiff foster children, with authority to select counsel for the children and generally to monitor the conduct of the litigation to protect the interests and put forth the claims of the foster children and the class they represent.

37. This application is brought on by Order to Show Cause because the matter it raises affects the daily conduct of the litigation and must be resolved expeditiously so that the litigation may go forward.

Marcia Robinson Lowry

Marcia Robinson Lowry

Sworn to before me this
6th day of November, 1974.

Peter Bienstock

Notary Public

PETER BIENSTOCK
Notary Public, State of New York
No. 24-4525323
Qualified in Kings County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,

Plaintiffs,

-against-

JAMES DUMPSON, et al.,

Defendants.

74 Civ. 2010 RLC

AFFIDAVIT

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DR. KENNETH CLARK, being duly sworn, deposes and says:

1. I am a professor of psychology at City College of the City University of New York, and for 20 years I was also Research Director at the Northside Center for Child Development.

2. I am the president of the Metropolitan Applied Research Center, and former president of the American Psychological Association.

3. I have written several books concerning the problems of ghetto children and their families, including Dark Ghetto and Youth in the Ghetto: A Study in the Consequences of Powerlessness.

4. I am willing to undertake the responsibility of appearing as guardian ad litem for the children in this action.

5. Based on my experience as a psychologist and in studying the problems of ghetto youth, it is my professional opinion that the right to some control over his or her own life is crucial to the development of children and that this right must include the ability of the child to have his or her views independently expressed and considered.

6. On November 4, I spoke privately to all the children named as plaintiffs in the above-captioned action. Each of them expressed to me a desire to have some role in any decision which would involve any change in their placement in foster care. I described my role to them as that of a friend who would speak for them among other adults and they agreed to have me play that role.

7. In assuming the responsibility as guardian ad litem for these children, and for the class of children they may represent if a class action is determined, I am willing to make an independent evaluation of which attorney can best represent the interests of these individual children and the members of their class, free from any conflicts of interest, and to monitor the representation of the children's interests as the litigation proceeds.

8. Although I have been contacted by the New York Civil Liberties Union with regard to this application for an appointment as guardian ad litem, I have agreed to assume this role with the understanding that my decisions as guardian ad litem will be made independently based on the interests of the children involved in this lawsuit. I have made no commitment to the Civil Liberties Union other than to interview the children, do my best to determine what interests they wish to express, and then, as guardian ad litem, do everything necessary to see that these interests are represented effectively to the court throughout the litigation.

9. In my judgment, the best way to assure that the interests of the class of children are independently presented to

the court is to have an independent adult guardian ad litem to intervene between the class and any lawyer representing it, and to have the power to hire and fire any particular lawyer, and to discuss with the lawyer issues arising as the litigation proceeds.

Kenneth B. Clark

Dr. Kenneth Clark

Sworn to before me this
5th day of November, 1974.

Peter Bienstock

Notary Public

PETER BIENSTOCK
Notary Public, State of New York
No. 24-4025358
Qualified in Kings County
Commission Expires March 30, 1975

EXHIBIT A

NYCLU

ew York Civil Liberties Union, 84 Fifth Avenue, New York, N.Y. 10011. Telephone (212) 924-7800

ildren's Rights Project
arcia Robinson Lowry, Project Director
ter Bienstock, Staff Counsel

Paul G. Chevigny, Counsel

October 29, 1974

Honorable Robert L. Carter
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: O.F.F.E.R., et al., v. Dumpson, et al.
74 Civ. 2010

Dear Judge Carter:

I am writing to the court in response to your indication at our conference on October 25 that the court intended to appoint separate outside counsel for the plaintiff foster children in O.F.F.E.R. v. Dumpson. As the attorney for the foster children, I object most strenuously to this action, and respectfully urge the court to consider the matter further.

If the court decides that separate representation for the foster parents and the foster children is appropriate, I am willing to withdraw as the attorney for the foster parents and serve only as attorney for the children. Indeed, I discussed this issue with all of the named foster parent plaintiffs in August, and secured their consent should such action become appropriate. The only reason I did not go forward with the actual substitution is that when the issue was raised orally before the court on August 5 by Elliot Hoffman, attorney for the city defendants, the court indicated that the question was one going to the substance of plaintiffs' claims, and should only be considered at the time that plaintiffs' substantive claims were litigated.

The New York State branch of the American Civil Liberties Union; Sheldon Ackley, Chairman; Ira Glasser, Executive Director

If the court now finds it advisable that plaintiff foster parents and plaintiff foster children be separately represented, however, I respectfully suggest that proper procedure requires that counsel and clients be given an opportunity to resolve the issue of representation. It is my understanding that when the possibility of conflict arises with regard to parties jointly represented by the same counsel, it is appropriate for the issue to be presented to counsel so that counsel can discuss it with his or her clients and a mutual decision be reached. The removal of counsel from representation of particular clients by the court over counsel's objection is a step usually taken only after a finding that counsel is incompetent or that his or her representation would otherwise jeopardize the party. The court's termination of my representation of some of my clients raises serious questions with regard to the right to representation. The court's proposed appointment of separate counsel for these children, in the absence of consultation with either the children themselves, their attorney, or their next friends in this action fails to afford these children their right to meaningful, independent representation with regard to the issues raised in the present case. In addition, such an appointment in the absence of any such consultation does not fully resolve the question of whether the newly-appointed attorney may have any conflicting interests.

I undertook representation of both foster parents and foster children in this action fully aware that the Canons of Ethics permit representation of co-plaintiffs in instances in which the interests being represented do not conflict. Thus in the proceeding before this court, plaintiffs are asserting only the constitutional right to a hearing, and not a ruling on who should prevail at a particular hearing, given a specific factual situation. Both foster parent plaintiffs and foster children plaintiffs argue that this hearing be provided, as a matter of constitutional right. If this right is established and hearings held, the interests of particular foster children and foster parents may well differ in particular instances.

However, I explained to the foster parent plaintiffs before I undertook their representation that should any conflict present itself in the present litigation, or should the court deem that such a conflict was possible, I would withdraw as counsel for the foster parents and continue to represent the children. If the court denies this option to me, I would have to seriously question whether I could in good conscience and consistent with my ethical responsibilities and the goals of the Children's Rights Project continue to represent solely the interests of foster parents in litigation in which the children are being represented by other counsel.

The affidavits of the named foster parent plaintiffs setting forth their understanding of the terms of my representation are attached. Attached also is the affidavit of Cheryl Wallace, the oldest of the foster child plaintiffs. I respectfully urge the court to reconsider with regard to the appointment of separate counsel for plaintiff foster children, and to instead give plaintiffs' counsel the opportunity to withdraw as counsel for the plaintiff foster parents only.

Very truly yours,

Marcia Robinson Lowry

Marcia Robinson Lowry
Director
Children's Rights Project
New York Civil Liberties Union

cc: All Counsel

Exhibit C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,

Plaintiffs,

-against-

JAMES DUMPSON, et al.,

Defendants.

74 Civ. 2010 RLC

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NASSAU)

CHERYL WALLACE, being duly sworn, deposes and says:

1. I am twelve years old. I understand that I have sworn to tell the truth and I understand what that means.

2. My sisters and I have talked with Marcia Robinson Lowry about being our lawyer and about how we feel about the possibility of having to leave Mr. and Mrs. Lhotan's home.

3. She explained to us that she was going to argue in court that we had a right to a review and to present what we thought before we could be taken from our foster parents' home.

3. I understand what having a lawyer means. I understand that it means that Ms. Lowry will present my viewpoint to the court, and the viewpoint of my sisters.

4. I want Ms. Lowry to continue being my lawyer.

Cheryl Wallace
(Cheryl Wallace

Sworn to before me this
28th day of October, 1974.

Notary Public

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,

Plaintiffs,

-against-

JAMES DUMPSON, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - - x

74 Civ. 2010 RLC

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NASSAU)

DOROTHY LHOTAN, being duly sworn, deposes and says; and GEORGE LHOTAN, being duly sworn, deposes and says:

1. We are plaintiffs in the above-captioned action.

2. We are also next friends for our foster children, Cheryl, Patricia, Cathleen and Cynthia Wallace, in the above-captioned action.

3. Cheryl is twelve years old, Patricia is eleven years old, Cathleen is nine years old, and Cynthia is eight years old.

4. When we first contacted Marcia Robinson Lowry and discussed our situation with her, she told us that her primary concern was to represent the children's interests, and that she would only represent us insofar as our interests did not conflict with the children's. We told her that we would be very satisfied with that, because we felt that the children were quite capable of expressing their own viewpoints if only someone would listen to them.

5. On our first visit with Ms. Lowry, we brought Cheryl, Patricia, Cathleen and Cynthia with us. The children spoke to Ms. Lowry out of our presence.

6. The children understand a great deal and they all know that Ms. Lowry is their lawyer and is representing them in court.

7. In August, Ms. Lowry contacted us and told us that she was considering representing only the children in the above-captioned action. She told us that if she did so, we would have to be separately represented by another lawyer.

8. We told her at that time that we would agree to her withdrawing as our lawyer and representing only Cheryl, Patricia, Cynthia and Cathleen in this litigation.

9. We agree to have Ms. Lowry withdraw as our attorney and to have another lawyer substituted to represent us.

10. As next friend of Cheryl, Patricia, Cathleen and Cynthia, we do not agree that any other lawyer be appointed to represent them, and wish to have Marcia Robinson Lowry continue as their lawyer.

11. We are fully aware that this means that Ms. Lowry is obligated to represent only the children's interests and not ours.

Mrs. Dorothy Lhotan
Dorothy Lhotan

George Lhotan
George Lhotan

Sworn to before me this
29th day of October, 1974.

Peter Beinstock
Notary Public

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,

Plaintiffs,

-against-

JAMES DUMPSON, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - x

74 Civ. 2010 RLC

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF QUEENS)

MADELINE SMITH, being duly sworn, deposes and says:

1. I am a plaintiff in the above-captioned action.

2. I am also next friend for Danielle and Eric Gandy in the above-captioned action. They have lived in my home for over ~~four~~ five years.

M.S.

3. When I first contacted Marcia Robinson Lowry and discussed with her the fact that Eric and Danielle Gandy were in jeopardy of being removed from my home, she told me that her primary concern was to represent the children and that she would only represent me insofar as my interests did not conflict with the children.

4. In August, Ms. Lowry contacted me and told me that she was considering representing only the children in the above-captioned action and that if she did so, I would have to be separately represented by another lawyer. I told her then that I would agree to her withdrawing as my lawyer and representing only Eric and Danielle Gandy and the other children involved in this litigation.

5. I agree to have her withdraw as my attorney and to have another attorney substituted.

6. As next friend of Eric and Danielle Gandy, I do not agree that any other lawyer be appointed to represent them, and wish to have Marcia Robinson Lowry continue as their lawyer.

7. I understand that this means that Ms. Lowry is obligated to represent only Eric and Danielle's interests, and not my own.

Madeline Smith

Madeline Smith

Sworn to before me this
28th day of October, 1974.

Notary Public

Notary Public, State of New York
No. 24-4623533
Qualified in Kings County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,

Plaintiffs,

-against-

JAMES DUMPSON, et al.,

Defendants.

74 Civ. 2010 RLC

AFFIDAVIT

- - - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

CHRISTIANE GOLDBERG, being duly sworn, deposes and says:

1. I am a plaintiff in this action along with my husband, Ralph Goldberg.

2. We are also next friends of our foster child, Rafael Serrano, in the above-captioned action.

3. Rafael Serrano is eleven years old and has lived in our home for five years.

4. When my husband and I first contacted Marcia Robinson Lowry and discussed Rafael's situation with her, she told us that her primary concern was to represent Rafael's interests, and that she would only represent my husband and me insofar as our interests did not conflict with Rafael's.

5. On my husband's and my first visit with Ms. Lowry, we brought Rafael with us. He spoke to Ms. Lowry out of our presence.

6. Rafael does not have a sophisticated understanding of the legal process but knows that Ms. Lowry is his lawyer and that she is representing him in court.

7. In August, Ms. Lowry contacted my husband and me and told us that she was considering representing only the children in the above-captioned action. She told us that if she did so, my husband and I would have to be separately represented by another lawyer.

8. My husband and I told her at that time that we would agree to her withdrawing as our lawyer and representing only Rafael Serrano and the other children involved in this litigation.

9. My husband and I agree to have Ms. Lowry withdraw as our attorney and to have another lawyer substituted to represent us.

10. As next friend of Rafael Serrano, we do not agree that any other lawyer be appointed to represent him, and wish to have Marcia Robinson Lowry continue as his lawyer. We are fully aware that this means that Ms. Lowry is obligated to represent only Rafael's interests and not ours.

11. I have discussed the contents of this affidavit with my husband, Ralph Goldberg, and he agrees with everything I have stated.

Christiane Goldberg

Christiane Goldberg

Sworn to before me this
28th day of October, 1974.

Notary Public

PETER BURSTOCK
Notary Public, State of New York
No. 24-4[illegible]
Qualified in [illegible] County
Commission Expires [illegible], 1976

UNITED STATES DISTRICT COURT
CHAMBERS OF
JUDGE ROBERT L. CARTER
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

October 29, 1974

Marcia Robinson Lowry, Esq.
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

Marttie Louis Thompson, Esq.
Community Action for Legal Services, Inc.
335 Broadway
New York, New York 10007

Adrian Burke, Esq.
Corporation Counsel
Municipal Building
New York, New York 10007

John F. O'Shaughnessy, Esq.
County Attorney of Nassau County
Nassau County Executive Building
West Street
Mineola, New York 11501

Louis J. Lefkowitz, Esq.
Two World Trade Center
New York, New York 10049

Re: Organization of Foster Families, et al. v. James Dumpson, et al. -74 Civ. 2010

Gentlemen:

On Friday, October 25, I met with counsel and indicated that it was my intention to appoint Miss Helen L. Buttenwieser as counsel for the children in the above entitled case. I indicated we came to that conclusion because of the possibility of a conflict of interest between the foster parents and the children and therefore felt that independent counsel for the children was necessary. At that time counsel

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,	
Plaintiffs,	74 Civ. 2010 RLC
-against-	ANSWER
JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS OF THE BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,	
Defendants.	

The children DANIELLE and ERIC GANDY, and RAFAEL SERRANO, and all other children similarly situated, by their attorney HELEN L. BUTTENWIESER, for their answer to the second amended complaint herein:

FOR A FIRST DEFENSE

1. Denies the allegations of paragraphs 5, 9, 10, 11, 59, 60, 61, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76 and 77 of the second amended complaint.

2. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 6, 7, 8, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57 and 58 of the second amended complaint.

3. Lacks information sufficient to form a belief as to the allegations of paragraph 38 of the second amended complaint except admits that the Catholic Guardian Society of New York is a child-care agency authorized, approved and regulated by the State of New York and supervised by state and city officials.

FOR A SECOND DEFENSE

4. The Court lacks jurisdiction of the subject matter.

FOR A THIRD DEFENSE

5. The second amended complaint fails to state a claim upon which relief can be granted.

FOR A FOURTH DEFENSE

6. The Plaintiffs have neither legal capacity nor standing to maintain this action, in that the rights sought to be protected are those belonging to the children and not to the Plaintiffs.

FOR A FIFTH DEFENSE

7. Deny that the persons whom the Plaintiffs purport to represent as a class are properly and fairly represented by the Plaintiffs.

8. The interests of the children whom Plaintiffs purport to represent, would be vitally and adversely affected by the granting of the relief prayed for in the second amended complaint.

FOR A SIXTH DEFENSE

9. Plaintiffs have failed to exhaust their administrative remedies.

WHEREFORE, it is respectfully prayed that judgment be entered dismissing the second amended complaint and granting such other relief as to the Court seems just and proper.

Dated: New York, New York
November 8, 1974

Helen L. Buttenwieser

HELEN L. BUTTENWIESER
Attorney for the children,
Daniell and Eric Gandy and
Rafael Serrano, and all other
children similarly situated
Office and P.O. Address
575 Madison Avenue
New.York, New York 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,	
Plaintiffs,	74 Civ. 2010 RLC
- against -	
JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS OF THE BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,	AFFIDAVIT
Defendants.	

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

HELEN L. BUTTENWIESER, being duly sworn, deposes and says:

1. I appear in this proceeding at the request of the Court to provide separate representation for the children, as a class, in this proceeding.

2. I make this affidavit in response to a motion to prevent my appointment as counsel for the said children.

3. The motion is based on three grounds: (1) that since there is no conflict of interest between the class of adults named as Plaintiffs and the class of children named as Plaintiffs, Plaintiffs' attorneys should be permitted to represent

counsel in this proceeding. Therefore, the court must

both the children and their foster parents; (2) that the children have requested the attorney making this motion to represent them; and (3) that I should be prevented from representing the children because it is alleged that I have a conflict of interest.

4. The first ground is not very sound, since it is apparent that procedures sought by foster families might well deprive the foster children of their right to a speedy determination as to their welfare.

5. The second ground - that the children have made their own choice - is equally untenable, since it is based on an election by children who cannot comprehend the issues involved. Danielle Gandy is six years old and Eric Gandy, nine years, is retarded, or at best "slow". None of the children had any alternative but to say "yes".

6. The third ground is based on allegation that I have a conflict of interest, arising from the fact that my everyday activity consists of bringing or defending proceedings on behalf of children whose rights conflict with the rights of adults seeking their custody. I see no conflict between this activity and the role which the Court has requested me to assume, any more than I see a conflict between the present role of Marcia Lowry and the role as MFY attorney which she previously held and which required her to protect the rights of the children's natural parents while I sought to have those same children remain permanently with their foster parents.

7. The only agencies involved in this proceeding are public agencies having administrative duties. The voluntary agencies who retain me to represent children in litigation involving, in some cases, the children's own parents, and in

a scarce place in a special school. The attachment of

some cases foster parents, will not be affected by the outcome of this proceeding.

8. The reference to my alleged comments, obviously taken out of context, does only Ms. Lowry a disservice, as they fail to show any bias on my part which would make me unfit to act as counsel to these and all other children.

For the reasons outlined, it is respectfully requested that the motion be denied.

Helen L. Buttenwieser
HELEN L. BUTTENWIESER

Sworn to before me this
12th day of November, 1974

Patricia Tritaris
Notary Public

PATRICIA TRITARIS
Notary Public, State of New York
No. 30-7000703
Qualified in Nassau County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY

U.S. DISTRICT COURT
FILED
DEC 11 1974
S.D. OF N.Y.

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC CANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ, MARY ROBINS; and DOROTHY NELSON SHABAZZ, on behalf of themselves and all others similarly situated,

Intervenor-Defendants.

#74563

74 Civ. 2010

O P I N I O N

The Decision to Appoint Separate Counsel for the Children

Plaintiffs brought this class action pursuant to 42 U.S.C. §1983 seeking a declaration that Sections 383(2) and 400 of the New York Social Services Law and 18 N.Y.C.R.R. 450.14 violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution. The complaint also requests that a three-judge court be convened pursuant to 28 U.S.C. §§2281 and 2284 and that the defendant agencies and officers be enjoined from enforcing the statutes and regulation. The three-judge court was appointed by an order dated June 27, 1974.

Plaintiffs Madeline Smith and Ralph and Christiane Goldberg are foster parents who have taken children into their homes and cared for them under the program provided by the New York Social Services Law. The complaint alleges that Mrs. Smith and the Goldbergs are members of two sub-classes which together are comprised of over one thousand foster parents who have cared for foster children continuously for more than one year. (Second Amended Complaint, Paragraph 6 (hereinafter "Complaint")). Pursuant to Rule 23(a)(3), it is alleged that the claims of these plaintiffs are typical of the claims of all

foster parents "who are in jeopardy of having [foster] children summarily removed pursuant to *** New York Social Services Law §§383(2) and 400, and 18 NYCRR 450.14, which violate their constitutional rights to due process and [e]qual protection of the law." (Complaint, Paragraph 8).

Plaintiffs Danielle and Eric Gandy, who are six and nine years old respectively, are the foster children of Mrs. Smith. Rafael Serrano, eleven years old, is the foster child of the Goldbergs. These children, who appear by their foster parents as next friends, claim to represent a sub-class of over one thousand foster children who have been in the same foster homes for more than one year. (Complaint, Paragraph 7). It is alleged that their claims are typical of those of foster children "who have been placed in stable, loving foster homes, and who are in jeopardy of losing what has become their family through the arbitrary, standardless procedures authorized by [the statutes and regulation here challenged]." (Complaint, Paragraph 10).

The same counsel from the New York Civil Liberties Union originally represented both the named foster parents and their class and the named foster children and their class. Furthermore, the Civil Liberties Union counsel proceeded on behalf of both groups under a single set of pleadings.

In addition, on oral argument, the GAL

The question of a possible conflict of interest between the foster parents and the children was raised in a hearing before this court on August 5, 1974. After consulting with my two colleagues on the three-judge court, I decided that in view of the potential conflict, separate counsel should be appointed for the children. On October 25, 1974, counsel for all parties were convened and informed of my decision and of my tentative choice of Helen L. Buttenwieser, Esq., to represent the children. At the meeting of counsel, Marcia R. Lowry, Esq., of the Civil Liberties Union first informed me that if she were required to choose between the foster parents and the children, she would prefer to continue to represent the children. She stated that she had made a personal commitment to the named children to represent them and that the foster parents had, from the outset, expressed their willingness to obtain separate counsel for themselves should a conflict arise. I indicated at that time that I thought that the decision to appoint independent counsel for the children was correct. My selection of Ms. Buttenwieser was confirmed by letter to all counsel on October 29, 1974.

The Civil Liberties Union brought on the instant motions by an order to show cause dated November 7, and oral argument was heard on November 15. The Civil Liberties Union lawyers seek an order pursuant to Rule 17(c), F.R.Civ.P., continuing the Civil Liberties Union as counsel to the foster children and requiring the foster parents to secure substitute counsel. In the alternative, the Civil Liberties Union counsel move for an order pursuant to Rule 17(c) appointing Dr. Kenneth Clark as guardian ad litem to the children. Both motions are denied.

The Pleadings Filed by the Civil Liberties Union Necessitated the Appointment of Separate Counsel for the Children

The primary reason for the original decision to appoint separate counsel for the children was the court's concern over the potential conflict of interest between the foster parents and the children.

The decision to replace the Civil Liberties Union as counsel for the children, rather than require the foster parents to obtain separate counsel, was based on the court's determination that the Civil Liberties Union could not adequately protect the interests of the children under the pleadings it had filed. Upon

examination of the pleadings, the court was most concerned that all of the allegations of the complaint were based on the uncritical assumption that the rights and interests of the children are identical to those of the foster parents. After claiming that each of the challenged procedures violated a particular right of the foster parents, the complaint alleged that the procedure violated precisely the same right of the foster children. The complaint made no mention whatever of possible interests of the children which might be adverse to those of the foster parents.

It appeared to the court that the effect of these pleadings was to align the children squarely with the foster parents. If the Civil Liberties Union were to proceed on behalf of the children under pleadings which assumed that the interests of the children and the foster parents were identical, the result would be to foreclose litigation of any dispute between the children and the foster parents. Accordingly, it seemed essential that separate counsel be obtained for the children, rather than for the foster parents, and that the substitute counsel for the children file a fresh set of pleadings.

that a class is adequately represented by counsel, and

The complaint alleges that one of the defendant agencies arbitrarily decided to remove the children, Eric and Danielle Gandy, from plaintiff Madeline Smith's home, and that although Mrs. Smith was notified of the agency's decision, she was not informed of the reasons therefor. Plaintiffs also claim that since the administrative conference procedure offered to Mrs. Smith under 18 N.Y.C.R.R. 450.14 is not regulated by written standards, it did not satisfy due process, (Complaint, Paragraphs 22-41)

The complaint also alleges that another of the defendant agencies plans to remove Rafael Serrano from the Goldbergs' home according to the same procedure. (Complaint, Paragraphs 42-57)

Plaintiffs claim further that the notification and administrative conference procedures violate the rights of Mrs. Smith, the Goldbergs and members of their class not to be deprived without due process of the "fundamental right to establish a home and bring up children" and of their rights under the Fourteenth Amendment generally. (Complaint, Paragraphs 59-61)

The paragraphs that follow allege violations of the foster parents' and the children's rights in practically identical terms. With respect to the

foster parents, it is alleged that §383(2) is "unconstitutionally vague" and violates their "fundamental rights to establish a home, bring up children and to enjoy those privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the due process guarantee of the Fourteenth Amendment." (Complaint, Paragraph 63) The allegations on behalf of the foster children respecting §383(2) are identical in substance and in language, except that the references to establishing a home and bringing up children have been deleted. (Complaint, Paragraph 64) In identical language, it is alleged that §400 of the Social Services Law violates the constitutional rights of foster parents and children. (Complaint, Paragraphs 66 and 67) [1]

The balance of the allegations in the complaint also assume that the rights and interests of the foster parents and the children are identical. Thus it is alleged that the absence of regulations interpreting §§383(2) and 400, the administrative conference procedure, and the "internal procedure" adopted by defendant

---

1 Paragraph 64 refers only to Rafael Serrano, while Paragraph 67 refers to all three named children.

Dumpson and his agents in June of 1974, violate the constitutional rights of all "plaintiffs and members of their class." (Complaint, Paragraphs 68, 72 and 73) The complaint claims further that the discretion given to private child-care agencies and the absence of any provision for a post-removal hearing for foster parents under the supervision of such private agencies deprive "plaintiffs Madeline Smith and Eric and Danielle Gandy and members of their class" of their rights under the Due Process and Equal Protection Clauses. (Complaint, Paragraphs 69 and 70) Two paragraphs allege in identical language that the absence of a prior hearing violates the Fourteenth Amendment rights of the named children and members of their class and the named foster parents and members of their class respectively. (Complaint, Paragraphs 76 and 77)

In addition to declaratory relief, the complaint requests that the defendants be enjoined from removing children who have lived with foster parents for more than one year without the "due process safeguards of adequate and specific notice and a prior hearing."

The Decision to Appoint Separate Counsel Reaffirmed

The Civil Liberties Union requests that the court reverse its appointment of Ms. Buttenwieser as counsel for the children and reinstate the Civil Liberties Union.

under Rule 17(c), the court is authorized and directed to make "such *** order as it deems proper for the protection" of the foster children.[2] The court made the required determination as to the best means of protecting the children when it made the initial decision to appoint Ms. Buttenwieser as separate counsel. On this motion under Rule 17(c), it has re-examined its conclusion. As set forth more fully below, the court remains convinced that there exists a potential conflict of interest between the foster parents and the children, and that the Civil Liberties Union cannot adequately protect the interests of the children under the pleadings it has filed.

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2 The full text of the third sentence of Rule 17(c) is as follows:

"The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

The fact that the children were already represented at the time of Ms. Buttenwieser's appointment did not preclude this court from making the appointment. See Zaro v. Strauss, 167 F. 2d 218, 220 (5th Cir. 1948) (appointment of guardian ad litem); 6 C. Wright and A. Miller, Federal Practice and Procedure, §1570, (1972 ed.).

In addition to its duty under Rule 17(c), since this is a class action, the court is subject to a duty under Rule 23(a)(4) to insure that plaintiffs will "fairly and adequately protect the interests of the class" of foster children. The determination required by Rule 23(a)(4) is left to the discretion of the trial court, Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 470 (S.D.N.Y. 1968), and an appellate court will not reverse the lower court's determination "in the absence of improvident action." Pelelas v. Caterpillar Tractor Co., 113 F. 2d 629, 633 (7th Cir. 1940), cert. denied, 311 U.S. 700 (1940).

Rule 23(a)(4) requires, inter alia, that the court assure itself that counsel for the representative parties will prosecute the action vigorously on behalf of the class. See Herbst v. Able, 47 F.R.D. 11, 15 (S.D.N.Y. 1969); Fogel v. Wolfgang, 47 F.R.D. 213, 216 (S.D.N.Y. 1969)

Ordinarily this issue would be resolved as a part of the court's decision on plaintiffs' pending motion for a class action determination. However, the issue of the children's counsel should be settled prior to the hearing before the three-judge court on the class action and other motions so that the children may be fully represented at that hearing. In Doe v. Norton,

365 F. Supp. 65, 69 (D. Conn. 1973), the plaintiff unwed mothers and illegitimate children challenged the constitutionality of certain Connecticut welfare legislation before a three-judge court. Prior to the decision on the class action motion by the three-judge court, Judge Blumenfeld considered such class action questions as typicality and adequate representation, and, on his own motion, appointed separate counsel for the children. His decision was based on a finding that "some of the interests which the mothers urge relating to the subject matter of this action are neither typical of nor congruent with the interests of their children, but actually conflict with them in several respects." 365 F. Supp. at 69.

For similar reasons, I have decided to deny the motion of the Civil Liberties Union in the instant case, and, pursuant to my power under Rules 17(c) and 24(a)(4), I reaffirm the appointment of Ms. Buttenwieser as independent counsel to the children.

The case is of vital importance to the well-being of more than one thousand children. In the course of this litigation, it is essential that the court make a thorough and searching examination of the interests of the natural parents, foster parents, the children and the public. The interests of all parties other than the children are well represented by

counsel in this proceeding. Therefore, the court must look to and rely heavily on the children's counsel to articulate and define their interests. The children's counsel must advocate the rights of the children and the children alone, vigorously, independently, and without regard to the interests of any other party to the action.

After re-examining the complaint, the court remains convinced that its primary objective is to secure the foster parents' claimed "fundamental rights to establish a home and bring up children." The result is that the interests of the children are asserted only insofar as they coincide with the foster parents' interests.

The complaint and motion papers filed by the Civil Liberties Union fail to give proper consideration to several possible conflicting interests of the children which have been suggested by other parties to this litigation. For example, it has been suggested that the notice and hearing procedures proposed by the plaintiffs may prevent the expeditious removal of a child in an emergency situation where the foster parents are unfit to care for the child. The court must consider the situation where it is in the interest of the child to leave the foster home as quickly as possible

to return to his natural parents or to take advantage of a scarce place in a special school. The attachment of the foster children to their natural parents should be considered. Finally, the court must assess the possibility that a child's needs and desires may be determined more effectively through examination by the trained personnel provided by state social welfare agencies than through an adversary hearing.

Considerations such as these have hitherto been advanced by one or another of the defendants, who, like the foster parents, have some interest of their own to advance simultaneously. It is my view that there must be independent counsel whose sole commitment is to the children, and who is therefore free to advocate their interests vigorously even though they may conflict with the interests of some other party to this litigation.

The Civil Liberties Union continues to adhere to its position that there is no conflict between the interests of the foster parents and those of the children. (Memorandum of Civil Liberties Union, Page 1.)

In view of the insistence by the Civil Liberties Union in its pleadings and on this motion that the children should be aligned with the foster parents, and

its attempt to foreclose the litigation of any dispute between the children and the foster parents, the court believes that the Civil Liberties Union cannot provide effective assistance to the court in defining, articulating and exploring those interests of the children which are potentially adverse to those of the foster parents.

Ms. Lowry of the Civil Liberties Union once more directs our attention to her personal commitment to represent the named children, and, in the event of a conflict, to require the foster parents to obtain separate counsel.

I am not disposed to lend much weight to this commitment, for Ms. Lowry has undertaken to represent not only the named children, but an entire class of more than 1,000 foster children who had no voice in retaining the Civil Liberties Union in the first instance. It is the responsibility of the court to insure

that the class is represented by counsel who will consider and advocate the needs and desires of children in a wide variety of circumstances, some of which may differ greatly from those of the three named children.

Furthermore, it is most doubtful that the named children, who are six, nine and eleven years old, can make an informed choice of counsel to represent their own interests. (See Affidavit of Helen L. Buttenwieser, Paragraph 5) I think that I am justified in attaching no weight whatever to the named children's choice as it affects the representation of the other children in the class.

The Civil Liberties Union has chosen a uniquely inopportune time to submit affidavits of foster parents averring that the foster children wish Ms. Lowry to continue to represent them. The submission of these affidavits attests the Civil Liberties Union's apparent inability to appreciate, much less to share, this court's concern over a potential conflict of interest between the foster parents and the children.

The Civil Liberties Union correctly states that this court has not found that the Civil Liberties Union has violated the Code of Professional Responsi-

bility.[3] However, the Civil Liberties Union argues further that in the absence of such a finding, the court may not provide substitute counsel for the class of children.

I disagree. As stated above, Rules 17(c) and 23(a)(4) provide ample authority for the appointment of separate counsel upon a determination that such appointment is necessary to insure adequate representation of the class of children. See Doe v. Norton, 365 F. Supp. 65 (D. Conn. 1973). The latter determination does not require a finding that the original counsel to the children have violated professional ethics.

The Civil Liberties Union also charges that Ms. Buttenwieser cannot provide independent representation for the children in view of her past representation of child-care agencies which place foster children. I do not, however, believe that the fact that Ms. Buttenwieser previously represented organizations that might have some interest in this litigation is, in itself,[4] of any consequence.

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3 There has been no suggestion that the Civil Liberties Union counsel have not discharged their duties according to the highest standards of our profession.

4 There is, of course, no suggestion of any unauthorized use of confidential information obtained in representing a former client.

In addition, on oral argument, the Civil Liberties Union contended that in view of the position taken by Ms. Buttenwieser in her answer filed on November 13, the court's reaffirmation of her appointment on this motion is tantamount to a determination on the merits. It should be noted, however, that when the court first appointed Ms. Buttenwieser in October, it had no inkling whatever of the position she would take on the issues in this case. Thus her selection was in no way influenced by a consideration of the merits.

Furthermore, although Ms. Buttenwieser ultimately did take a position on the issues in the case, the court has every reason to believe that she did so upon consideration of the interests of the children alone, and without regard to the interests of any other party to this litigation.

I disagree with the Civil Liberties Union's contention that a full evidentiary hearing should have been held before the appointment of separate counsel for the children. In each of the cases cited by the Civil Liberties Union, one party sought to disqualify counsel for the opposing party, charging serious violations of professional ethics. E.g., Laskey Bros. v. Warner Bros. Pictures, 224 F. 2d 824 (2d Cir. 1954);

Consolidated Theatres v. Management Corp., 216 F. 2d 920, 921-22 (2d Cir. 1954). As noted, the instant case does not involve charges of ethical violations, and the court has acted on its own motion on behalf of the children in retaining counsel for them. The court's action is similar to that of a party in retaining counsel on his own behalf, and that is not usually the occasion for an evidentiary hearing. Furthermore, Rule 17(c) does not require such a hearing when the court appoints counsel for an infant. Moreover, since a court may determine the competence of counsel, as required by Rule 23 (a)(4), without an evidentiary hearing, solely on the basis of the pleadings, Rosenblatt v. Omega Equities Corp., 50 F.R.D. 61, 64 (S.D.N.Y. 1970), a court should be able to determine on the basis of the pleadings alone whether a potential conflict may exist and whether counsel for the class may not be willing to press all possible claims of the class.

Finally, it is to be noted that, contrary to the implication of the Civil Liberties Union's memorandum, this court has given the Civil Liberties Union an adequate opportunity to be heard on the issue of counsel, including an informal conference and full oral argument on the instant motion.

The Civil Liberties Union also contends that the court's action in replacing it by independent counsel for the children deprives the children of the right to appear by counsel of their own choice, a right which was extended to minor children by Application of Gault, 387 U.S. 1 (1967).

Gault seems to bear only a remote relation to the issues on this motion since it concerns the right of a single 15-year old m or and his parent to have the assistance of counsel in a juvenile delinquency proceeding which was "comparable in seriousness to a felony prosecution." 387 U.S. at 36. Furthermore, this court has obviously not deprived the class of children of counsel altogether. Indeed, in appointing separate counsel, the court has attempted to vindicate the right of the entire class of children to effective, disinterested counsel. As to the named children's right to choose their own counsel, this right is necessarily subject to some limitation where the named parties seek to pursue their interests through a class adjudication which will bind over a thousand other persons who had no part in the original selection of counsel.

Motion for Appointment of Guardian Ad Litem

The Civil Liberties Union moves in the alternative for the appointment of Dr. Kenneth Clark as guardian ad litem to the children, pursuant to Rule 17(c). It is proposed that Dr. Clark be permitted to make an independent evaluation of the issues in the case and appoint counsel who, in his judgment, will best protect the interests of the children.

Rule 23 imposes a duty on the court to assure that a class is adequately represented by counsel, and Rule 17(c) requires the court to make provision for the protection of an infant. [5] This court has discharged those duties by appointing Ms. Buttenwieser as counsel, and it refuses to shift its responsibilities to a guardian ad litem.

Thus the motion for the appointment of a guardian ad litem is also denied.

SO ORDERED.

Dated: New York, New York
December 10, 1974

Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

5 Rule 17(c) does not require the appointment of a guardian ad litem, but authorizes the court to make any other order which it "deems necessary for the protection" of the foster children.

NYCLU

New York Civil Liberties Union, 84 Fifth Avenue, New York, N.Y. 10011. Telephone (212) 924-7800

Children's Rights Project
Marcia Robinson Lowry, Project Director
Peter Bienstock, Staff Counsel

Paul G. Chevigny, Counsel

December 13, 1974

Honorable Robert L. Carter
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Organization of Foster Families
for Equality and Reform, et al.
v. James Dumpson, et al.,
74 Civ. 2010

Dear Judge Carter:

I am writing with reference to the court's decision dated December 11, 1974 in the above-captioned action. At the oral argument on November 15, 1974, I asked the court for an order pursuant to 28 U.S.C. § 1292(b) which would state that the decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Although I believe that we have an appeal as of right from the court's decision and order, in the event that any of the parties should oppose the hearing of the appeal, or the Second Circuit should find that the appeal is a discretionary one, an order containing the statement described above may be necessary. I am requesting such an order by letter instead of by motion because an application was made orally during the argument and because your law clerk indicated that the court has directed that no new motions be made until the counsel issue is resolved.

It is my understanding from my phone conversation with your law clerk on December 11 that it was the court's intention at the conclusion of the November 15th hearing that no new motions be made in this action and that no hearing would be held on the pending motions until the counsel issue is fully resolved by the appellate courts. If I am incorrect in that understanding, I would appreciate being so advised. We will, of course, move as expeditiously as possible in seeking appellate review.

Very truly yours,

Marcia Robinson Lowry
Attorney for Plaintiffs

cc: Honorable J. Edward Lumbard
Honorable Milton Pollack
All Counsel

Copy

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL Serrano, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

74 Civ. 2010

#41630

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY, BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPACIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHITS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ, MARY ROBINS, and DOROTHY NELSON SHABAZZ, on behalf of themselves and all others similarly situated,

Intervenor-Defendants.

DEC 24 1974
S.D. OF N.Y.

OPINION

Plaintiffs' counsel has written a letter dated December 13, 1974, to the court requesting that the court certify for appeal, pursuant to 28 U.S.C. §1292(b), its decision of December 11, 1974, holding that under the present pleadings, plaintiffs' counsel cannot protect the interests of the children under the care of foster parents. Based on that rationale Ms. Buttenwieser was appointed counsel for the children, confining plaintiffs' counsel to representation of the plaintiff foster parents. Treating the letter as a motion to certify the issues for appeal pursuant to §1292(b), the motion is denied.

The court does not view questions of whether independent counsel should be appointed for the children and whether under these pleadings plaintiffs' counsel can fairly represent the children's interest, either solely as counsel for the children or as counsel for both the children and the foster parents, as controlling questions of law in the context of the case. As I see it, what is in controvery here is a fact issue peculiar to this case, that is, whether under the particular pleadings filed in this case, plaintiffs' counsel can fairly represent the interest of the children in the care of foster parents.

Moreover, it is my impression that the order appointing separate counsel for the children is a final judgment for purposes of appeal. See General Motors v. City of New York, 501 F. 2d 639, 644 (2d Cir. 1974) Adv., and cases cited therein.

When the determination on the issue of counsel was made orally prior to the filing of the written opinion, I made clear that the status quo would be preserved and that no new motions were to be filed. The parties were, however, advised to answer all outstanding motions. Apparently, some confusion still exists on this point; and hence, I reaffirm what I thought I made clear earlier. The status quo is preserved to allow the issue of counsel to be settled. It will be altered only on clear showing that one of the parties will suffer irreparable harm if the sought-for action is not allowed.

SO ORDERED.

Dated: New York, New York
December 23, 1974

Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants.

74 Civ. 2010 RLC

NOTICE OF APPEAL

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Notice is hereby given that the plaintiffs herein hereby appeal to the United States Court of Appeals for the Second Circuit from the opinion and order of the Honorable Robert L. Carter, entered in this action on December 11, 1974, disqualifying counsel to the plaintiffs herein from further representation of plaintiffs Rafael Serrano, Danielle and Eric Gandy, and Cheryl, Cynthia, Patricia and Cathleen Wallace.

Dated: New York, New York
December 27, 1974

Marcia Robinson Lowry

Marcia Robinson Lowry
Peter Bienstock
Attorneys for Plaintiffs
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Louise Gans, Esq.
Community Action for Legal Services
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New York, New York 10013

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -x

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

-against-

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants-Appellees.

- -x

75-7033

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties to this appeal that the appeal initiated by Notice of Appeal dated December 31, 1974 is hereby withdrawn without prejudice to any party's right to full appellate review at the conclusion of the district court proceedings herein.

Marcia Robinson Lowry

Marcia Robinson Lowry
Peter Bienstock
Children's Rights Project
New York Civil Liberties Union
Attorneys for Appellants

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Attorney General of the State of
New York
Attorney for Appellees Shapiro
and Lavine

By: Stanley L. Kantor, Esq.
Assistant Attorney General

ADRIAN BURKE, ESQ.
Corporation Counsel
Attorney for Appellees Dumpson
Beine and Dall

By: Elliott Hoffman, Esq.
Assistant Corporation Counsel

JOHN F. O'SHAUGHNESSY, ESQ.
County Attorney of Nassau County
Attorney for Appellee D'Elia

By: James Gallagher, Esq.
Assistant County Attorney

MARTTIE L. THOMPSON, ESQ.
Community Action for Legal Services
Attorney for Intervenor-Appellees

By: Louise G. Gans, Esq.

HELEN BUTTENWIESER, ESQ.
Court-Appointed Attorney for Appellees

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

3d

- x

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

74 Civ. 2010

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenor-Defendants.

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OPINION

I

Plaintiff foster parents have moved, pursuant to Rule 23, F.R.Civ.P., to certify as a class all foster parents having a foster child who has lived continuously with them for over one year. Prior to the appointment of separate counsel, plaintiff foster children had moved for certification as a class all foster children who have lived continuously with their foster parents for over one year. In addition, intervenor-defendants have asked the court to certify as a class all natural parents who have voluntarily placed children in foster care. Since each class satisfies the requirements of Rule 23(a) and 23(b)(2), F.R.Civ.P., the motions are granted.

A. Numerosity (Rule 23(a)(1))

As of September 30, 1973, there were 32,115 children in foster care with a family in New York State. New York State Department of Social Services, Social Statistics, A Monthly Summary, Vol. XXXV, No. 10, (Oct. 1973). [1/] The number of children who, at any one time, are with a foster family with whom they have been living continuously for more than one year is fixed, but not easily ascertainable. Plaintiffs estimate that

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1/ Recent data shows that this figure has remained fairly constant. As of July 1975, 31,224 children were so situated. New York State Department of Social Services, Social Statistics, A Monthly Summary, Vol. XXXVII, No. 8 (Aug. 1975).

one-half of those children in foster care are so situated. Even if the figure were closer to one-tenth there would be a sufficient number of class members to make joinder impracticable. Likewise, however one estimates the number of foster parents with whom these children have been living, the total seems bound to satisfy the numerosity requirement. Indeed, the standard under Rule 23(a)(1) is the impracticability of joinder, see generally 7 Wright & Miller, Federal Practice and Procedure §1762 (1972), and the difficulty of identifying class members is a factor the court may consider, along with numerosity, in determining the feasibility of joining all parties. Poe v. Menghini, 339 F. Supp. 986, 990 (D. Kan. 1972); see Yaffe v. Powers, 454 F. 2d 1362, 1366 (1st Cir. 1972). While normally greater exactness in the computation of the size of a class should be demanded of a party, Demarco v. Edens, 390 F. 2d 836, 845 (2d Cir. 1968), in this case there can be no doubt that the two groups are sufficiently large. It is also unlikely that either class is too large to be maintainable, see, e.g., Almenares v. Wyman, 334 F. Supp. 512, 518 (S.D.N.Y.), modified on other grounds, 453 F. 2d 1075 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972), especially since there is no claim for damages.

Intervenors estimate that at least 7,800 parents have signed voluntary release forms placing their children in foster care. While their method of computation seems no more exact than that of plaintiffs, it is not challenged by any other party. And once again, the size of the foster care system makes it unquestionable that it affects many people in the ways challenged in this suit.

B. Common Question of Law or Fact (Rule 23(a)(2))

The challenged statutes and regulations are of state-wide application. The procedures have been altered in New York City, but that action was taken under the authority of the existing statute and regulations which continue to have force throughout the state and the abandoned procedures could easily be reinstated. 2/

2/ Alternatively, since plaintiffs contend that the revised New York City procedures are inadequate under Fourteenth Amendment strictures as well, each proposed class could be viewed as composed of two subclasses--those subject to the revised New York City procedures, and those living in the remainder of the state. See Rule 23(c)(4), F.R.Civ.P. However, since the interests of these groups are not antagonistic, Wetzel v. Liberty Mutual Insurance Co., 508 F. 2d 239, 247-48 (3d Cir.), cert. denied, 421 U.S. 1011 (1975), and since only one statutory scheme is challenged, Wolfson v. Solomon, 54 F.R.D. 584, 588 (S.D.N.Y. 1972), there is no need to certify subclasses.

There can be no doubt that each member of each class faces a question of law identical to that faced by every other member of the class. If the statutory or revised New York City procedures are constitutionally deficient, as plaintiff foster parents assert, the defects strike all equally. Class action status is frequently deemed appropriate in cases such as this challenging the propriety of state or federal law. See, e.g., Frost v. Weinberger, 375 F. Supp. 1312, 1317 (E.D.N.Y. 1974), rev'd on other grounds, 515 F. 2d 57 (2d Cir. 1975); United States ex rel. Walker v. Mancusi, 338 F. Supp. 311, 315-16 (W.D.N.Y. 1971), aff'd on other grounds, 467 F. 2d 51 (2d Cir. 1972).

C. Representative Parties' Claims or Defenses Typical of the Claims or Defenses of the Class (Rule 23 (a)(3))

As described in Judge Lumbard's opinion on the merits filed today, the foster parents who would represent a class all fear, with varying degrees of immediacy, the removal without prior hearings of foster children who have lived with them continuously for more than one year. The named children face the possibility of being moved without the procedural protections to which they may be entitled. The intervenors all have children currently in the foster care system. They

all voice a concern that any changes in the present system will adversely affect them in ways that would be the same for all other parents who have voluntarily placed children in foster care. They are all, therefore, typical of the classes they seek to represent. Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 521 (S.D.N.Y. 1973), appeal dismissed, 496 F. 2d 1094 (2d Cir. 1974).

D. Fair and Adequate Protection of the Class' Interests (Rule 23(a)(4))

Counsel for each of the representative parties have assiduously advocated the rights of those before the court and of the class members not present. I would particularly like to thank court-appointed counsel, Helen Buttenweiser, for undertaking the burden assigned to her and for a well conceived and helpful presentation of her understanding of the scope and reach of the rights of foster children.

contention that a hearing is therefore superfluous when a

E. Action or Inaction on Grounds Generally Applicable to Class--Appropriateness of Injunctive or Declaratory Relief (Rule 23 (b)(2))

Plaintiff foster parents have asked for declaratory and injunctive relief that would establish for them certain procedural safeguards before a foster child can be removed from their care. Both counsel for the foster children, and counsel for intervenors have opposed this relief. No damages are sought. This situation is ideally suited for class action treatment under subdivision (b)(2) of Rule 23, F.R.Civ.P., since the decision of the court will have a similar impact on broad groups of people. In fact, this is the kind of situation envisioned by the drafters of Rule 23. See Advisory Committee Notes to Rule 23, F.R.Civ.P. and cases cited therein: Escalera v. New York City Housing Authority, 425 F. 2d 853, 867 (2d Cir.), cert. denied, 400 U.S. 853 (1970); Agron v. Montanye, 392 F. Supp. 454, 455 (W.D.N.Y. 1975); Lynch v. Baxley, 386 F. Supp. 378, 386-87 (M.D. Ala. 1974). Since class action treatment is so clearly appropriate under subdivision (b)(2), I do not need to consider whether any of these classes might also be proper under (b)(1).

F. Notice

There has been no opportunity for notice to the class, but that is immaterial since notice is no longer required in 23(b)(2) class actions in this circuit, Frost v. Weinberger, supra, 515 F. 2d at 64-65; and in a case such as this, where the court is in a position to determine that the various arguments of the classes have been effectively presented, notice is not needed. Wetzel v. Liberty Mutual Insurance Co., supra, 508 F. 2d at 254-57; Baxter v. Savannah Sugar Refining Corp., 350 F. Supp. 139, 141 (S.D. Ga. 1972), aff'd in part, rev'd in part on other grounds and remanded, 495 F. 2d 437 (5th Cir.), cert. denied, 419 U.S. 1033 (1974); Citizens Environmental Council v. Volpe, 364 F. Supp. 286, 288 (D. Kan.), aff'd, 484 F. 2d 870 (10th Cir. 1973). All three classes, therefore, are appropriate for class certification.

II

Intervenor-defendants have moved pursuant to Rule 15, F.R.Civ.P., to amend their complaint, and also ask under Rule 21, F.R.Civ.P., to be allowed to join an additional party.

///

The motion to amend is granted and the proposed amended intervenor-complaint is accepted, including the first thirteen affirmative defenses, but not including affirmative defenses 14 and 15, or the proposed cross-claim. In a previous order, intervenors were given permission to assert the rights of the natural parents of children in foster care, but only in respect of those issues raised in plaintiffs' second amended complaint. Order of August 15, 1974. Intervenors' affirmative defenses 1-13 are genuinely responsive to plaintiffs' lawsuit and should be considered as part of this case. Affirmative defenses 14 and 15 raise issues similar to those rejected in the order of August 15, 1974 as likely to expand the scope of the lawsuit. For example, intervenors assert that, for a number of reasons, natural parents do not give informed consent when they place children in the foster care system.

Likewise, intervenors' proposed cross-claim seeks to expand the issues of this lawsuit. As is amply demonstrated by the allegations in the cross-claim, intervenors again seek to raise questions concerning the placement of children in foster care,

and the relationship between natural parents and the foster care system. Intervenors have not narrowed their cross-claim to deal with the rights of natural parents, if any, that are or might be infringed were the three-judge court to grant increased procedural rights to plaintiff foster parents or foster children.

Intervenors move that Lillian Collazo be joined as an additional party. That motion is granted. Ms. Collazo is the natural parent of a child in the foster care system. She has a legitimate concern with the procedures that guide that system, and therefore the questions of law raised in this case apply to her as well as to the other intervenor-defendants. Rule 20(a), F.R.Civ.P.

In sum, the motions to certify a class of plaintiff foster parents, plaintiff foster children, and intervenor-defendant natural parents are granted. Intervenors' motion to amend their complaint is granted except for affirmative defenses 14 and 15 and the cross-claim, which are not allowed; and intervenors' motion to join an additional party is granted.

SO ORDERED.

Dated: New York, New York
March 22, 1976

ROBERT L. CARTER
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DORTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

-v-

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenors-Defendants.

OPINION

74 Civ. 2010

Before LUMBARD, Circuit Judge, and POLLACK and CARTER, District Judges.

LUMBARD, Circuit Judge:

The Organization of Foster Families for Equality and Reform (OFFER) and three individual foster families bring this class action for injunctive and declaratory relief seeking the invalidation of New York Social Services Law §§ 383(2) and 400, and N.Y.C.R.R. § 450.14. Plaintiffs allege in their complaint that the above provisions violate both the Equal Protection and Due Process Clauses of the Fourteenth Amendment in that they authorize the state to remove foster children from their foster homes without affording a prior hearing to either foster child or foster parents. 1/

Plaintiff foster parents initially sought to represent, as "next friend," the interests of their foster children as well. However, to forestall any possible conflict of interest, Judge Carter appointed Helen Buttenwieser as independent counsel for the foster children, advising the parties of his action by letter dated October 29 1974. In that capacity, she has consistently argued that the foster parents have no constitutionally cognizable interest independent of those of the foster children and that an adversary hearing is not the proper forum to determine the "best interest of the child." 2/ The defendants--government officials at the state and local level and the Executive Director of the Catholic Guardian Society--are responsible for administering the foster care system within their respective jurisdictions. In addition, five biological mothers of children currently in foster care were granted leave to intervene in these proceedings on behalf of themselves and all others similarly situated. 2a/

The present statutory scheme, applicable throughout most of the state,[3] provides that the local public welfare department or an authorized private agency acting on its behalf[4] may, in its discretion and on 10 days notice, order the removal of any foster child from the foster home in which he or she has been placed. Social Services Law §§ 383(2) and 400. After having been informed of the impending removal in a printed notice which contains no space for any detailed elucidation of the reasons for that removal, the foster parents may request a conference with a "public official" of the local social services department at which they have an opportunity to express their dissatisfaction with the agency's decision but no formal manner is provided whereby they may contest it. N.Y.C.R.R. § 450.14.

Although the foster parents may be accompanied to the conference by "a representative," they may not present or cross-examine witnesses, nor may they inspect the agency files even if records contained therein formed the predicate for the administrative decision. Yet, despite these handicaps, the burden is upon the foster parents to submit "reasons why the child should not be removed." The agency, by contrast, has no countervailing obligation to provide an articulated rationale for removing the child. N.Y.C.R.R. § 450.14. There is evidence in the record which indicates that rarely, if ever, do these pre-removal conferences result in the reversal of the initial decision. Post-removal, the foster parents are entitled to a "fair hearing," Social Services Law § 400(2), and then, if still "aggrieved" by the agency action, they may obtain judicial review.

Plaintiffs contend that these procedures deprive them of "liberty and property" interests without due process of law. The specific liberty interest which they assert is

to
the right/familial privacy. E.g. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Griswold v. Connecticut, 381 U.S. 479 (1965). Cognizant that each of the Supreme Court decisions in this area dealt with a more traditional, biological family, plaintiffs rely on several recent studies which functionally define the family as a psychological rather than a biological unit. Goldstein, Freud and Solnit, BEYOND THE BEST INTERESTS OF THE CHILD. Plaintiffs insist that after one year of foster care, emotional attachments have formed which the state should not be at liberty arbitrarily to upset. Plaintiffs further assert that the statistical evidence as to the length of the average child's stay in foster care creates an "informal tenure" system raising legitimate expectations that their role as foster parents will not be abruptly terminated.[5/] Perry v. Sinderman, 408 U.S. 593 (1972). To illustrate the arbitrary manner in which they claim the outlined statutory provisions can operate, plaintiffs offer the example of their own personal involvement with the foster care system.

Madeline Smith is a 53 year old widow who lives in East Elmhurst, New York. She became an approved foster parent[6/] under the supervision of the Catholic Guardian Society of New York in 1969. On February 1, 1970, she took Eric and Danielle Gandy into her home as foster children. At the time, Eric was four and Danielle two. Plaintiffs claim, and defendants do not dispute, that Danielle has never seen her natural mother and Eric no longer remembers her. Both children, who are legally free for adoption consider Mrs. Smith to be their mother.

Nevertheless, on March 29, 1974, Mrs. Smith was notified by letter from the Catholic Guardian Society that Eric and Danielle were to be removed from her care because

"it is now in their best interests to leave your home." The agency's concern, not shared by Mrs. Smith, was that her arthritis would interfere with her undeniably well-meaning efforts to supervise the increasingly active behavior of Eric and Danielle. Although Mrs. Smith signed a waiver of her right to a pre-removal conference, she made it abundantly plain that she had no intention of surrendering the children. When told that they would be forcibly taken from her, she obtained a lawyer and began the instant litigation. To date, the children remain in Mrs. Smith's home--originally the result of a temporary restraining order, later the product of a voluntary stipulation among the parties.

Plaintiffs Mr. and Mrs. Lhotan are similarly authorized foster parents; they, however, are under the supervision of the Nassau County Department of Social Services Children's Bureau. On September 4, 1970, Cheryl and Patricia Wallace were placed in the Lhotan home; two years later they were joined by their younger sisters, Cynthia and Cathleen. By all accounts, most notably that of the children, the reunion was a happy one for all concerned. Indeed, when Mrs. Lhotan was told on June 26, 1974 that the children were to be removed from her home ten days hence, the only reason given was that the four girls were growing too attached to their foster family. Mrs. Lhotan was informed that Cheryl and Patricia were to be returned to their biological mother while Cynthia and Cathleen were to be transferred to another foster home.

However, on July 8, 1974, in response to a request by the Lhotans, Judge Carter issued a temporary restraining order barring the removal of the children which had been scheduled for the next day. That order remained in effect

until March 3, 1975, when it was dissolved by this court. Meanwhile, Mrs. Wallace, the biological mother, had begun habeas corpus proceedings in the state court to secure the return of her children. On February 23, 1976, the Appellate Division for the Second Department upheld a lower court ruling mandating immediate implementation of the plan devised by the Nassau County Department of Social Services Children's Bureau. The time for appeal of that decision has not yet passed.

Mr. and Mrs. Ralph Goldberg, the final set of plaintiff foster parents, face a less imminent threat. They have, since July 1969, taken care of Rafael Serrano, then six years old. Prior to his placement in the Goldberg home, Rafael had lived with a succession of foster families after having been abused by his natural parents during the time that he remained with them. Although the Goldbergs have been repeatedly told that they have done an excellent job in providing a healthy environment in which Rafael might grow and develop, they now fear, on the basis of various unofficial statements, that the Bureau of Child Welfare intends to remove Rafael and place him with his aunt. While the Goldbergs have yet to be officially notified of any such plan, they join in this action to insure that they will be entitled to a pre-removal hearing if and when such a decision is made.

Neither defendants nor intervenors dispute the strength of the emotional ties binding plaintiffs and their foster children nor the loss that will be felt if those ties are severed. Both defendants and intervenors insist, however, that the question now before us is and must be more narrowly focused. We agree. As a statutorily ordained court we must limit our inquiry to a determination of whether plaintiffs have established a deprivation of life, liberty or property sufficient to invoke the protections of the Due Process Clause.

We find no merit in plaintiffs' argument that the realities of the foster care system, as presently administered in New York State, justify their expectation that their role as foster parents will not be abruptly and summarily terminated. See Board of Regents v. Roth, 408 U.S. 564 (1972). The most obvious and formidable obstacle to plaintiffs' contention is the agreement that each of them signed upon assuming responsibility for their respective foster children. The contract employed by the Catholic Guardian Society, typical of those used throughout the state, reserves to the agency the right to recall the child "upon request, realizing that such request will only be made for good reason." While such a provision is not dispositive, Perry v. Sinderman, 408 U.S. 593 (1972), the discretionary authority which it vests in the agency is on its face incompatible with plaintiffs' claim of legal entitlement. We are unpersuaded by plaintiffs' efforts to equate an open-ended relationship with one of indefinite duration. Nor does evidence showing that the average child placed in foster care remains within the system for approximately 4-1/2 years[7/] support the plaintiffs' position. Cf. Perry v. Sinderman, supra.

We find considerably more difficult plaintiffs' assertion that the foster home is entitled to the same constitutional deference as that long granted to the more traditional biological family.[8/] Plaintiffs base their contention upon several recent studies which conclude that the "family" can best be conceived as a psychological entity, uniquely characterized by the emotional interdependence of each of its members. E.g., Goldstein, Freud and Solnit, BEYOND THE BEST INTERESTS OF THE CHILD. Plaintiffs argue that it is this interdependence, born out of daily and

intimate contact, which best explains the family's pre-eminent constitutional position. Plaintiff foster parents further insist that their relationship with their foster children fully satisfies this functional definition, although custody of the child is vested in the authorized agency. Social Services Law § 383 (2). They point to decisions such as Stanley v. Illinois, 405 U.S. 645 (1972), which, they claim, indicate the Supreme Court's willingness to look behind legal formalities when inquiring into the existence of a fruitful family life.[9/]

While the intervenors and defendants rely on precisely the same Supreme Court opinions, they emphasize that the holding of each was limited by its facts to biological families. Intervenors, in particular, strongly protest any implication that the contractual relationship between foster parent and foster child is, or ever can be, the equivalent of the relationship between a mother and the child to whom she has given birth.[10/] Intervenors have introduced affidavits from eminent experts in social work and psychology which attack the validity of the concept of the "psychological family."[11/] The intervenors also argue that

/this court would be ill-advised to create a precedent which might later be applied to other foster families less concerned and well-intentioned than those now before us.

We agree with the parties that this debate as to the definition of the family and its role in society is an interesting and important one. We need not and should not, however, reach out to decide such novel questions when narrower grounds exist to support our decision. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

We believe that the pre-removal procedures presently employed by the state are constitutionally defective. We hold that before a foster child can be peremptorily transferred from the foster home in which he has been living, be it to another foster home or to the natural parents who initially placed him in foster care, he is entitled to a hearing at which all concerned parties may present any relevant information to the administrative decisionmaker charged with determining the future placement of the child. [11a/] While our decision today is perforce limited to the class as defined in Judge Carter's accompanying certification order, namely all children in foster care for one year or longer, we note that similar interests suggest a similar result whenever the child is placed in a foster home for long term care. [12/]

The time has long since passed when children were considered mere chattels of the adults with whom they lived. The foster care system itself, initiated in New York in the latter part of the nineteenth century, represented a large step foward from the prior practice of institutionalizing children with the poor and feebleminded or boarding them out as apprentices or indentured servants. In any event, it is by now well-settled that children are "persons" within the meaning of the Fourteenth Amendment whose rights are entitled to protection against state abridgement. In re Gault, 387 U.S. 1 (1967); Tinker v. Des Moines School District, 393 U.S. 503 (1969); Goss v. Lopez, 419 U.S. 565 (1975). Foremost among those rights, as the Supreme Court has repeatedly held, is the right to be heard before being "condemned to suffer grievous loss," Joint Anti-Fascist Committe v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

The basis of this right is easily understood. A hearing dispels the appearance and minimizes the possibility of arbitrary or misinformed action. Goldberg v. Kelly, 397 U.S. 254, 266 (1970). In cases such as these, the harmful

consequences of a precipitous and perhaps improvident decision to remove a child from his foster family are apparent. Plaintiffs' experts assert that continuity of personal relationships is indispensable to a child's well adjusted development. We do not need to accept that extreme position to recognize, on the basis of our common past, that the already difficult passage from infancy to adolescence and adulthood will be further complicated by the trauma of separation from a familiar environment. This is especially true for children such as these who have already undergone the emotionally scarring experience of being removed from the home of their natural parents.

Intervenors dispute the seriousness of these losses, relying principally on a longitudinal study conducted by Professor David Fanshell of the Columbia University School of Social Work in which he concluded that there was no statistically significant correlation between a child's successful development and the number of times that child was moved within the foster care system. We find significant, however, Prof. Fanshell's further testimony that, "as a professional, [I] would be against the capricious movement of children." The requirement of a hearing is designed to insure no more.

Most specifically, a hearing is not, as intervenors apparently fear, intended in any way to impede the right of biological parents to regain custody of their children. The law in New York is clear: in the absence of abandonment, formal surrender for adoption or demonstrated unfitness, the "primacy of parental rights may not be ignored." People ex rel. Kropp v. Shepsky, 305 N.Y. 465, 469 (1953); see also, Spence-Chapin Adoption Service v. Polk, supra. We do not, by our holding today, disturb that local judgment. 13/

Nonetheless, we are unable to agree with intervenors' contention that a hearing is therefore superfluous when a foster child is to be returned to his biological parents. Even under such circumstances, a hearing performs the salutary function of providing the agency with an organized forum in which to gather information concerning, inter alia, the frequency with which the biological parent has been visiting his or her child. If the evidence discloses that, despite the diligent efforts of the agency, the biological parent has failed for more than a year to maintain "substantial and continuous contact" with a child in foster care, permanent neglect proceedings may be instituted and the biological parent's presumptive right to custody may be forfeited. Family Court Act § 611, et seq.; In re P., 337 N.Y.S. 2d 203 (Fam. Ct. N.Y.Co. 1972). A fortiori, when the question is whether a foster child is to be moved from one foster home to another, the state in its parens patriae capacity, will be better able to make an informed decision after a hearing at which all relevant information has been presented. The interest of the state, as parens patriae, is therefore compatible with, rather than antagonistic to, the requirement of a hearing. Goldberg v. Kelly, 397 at 2

Plainly, the present pre-removal conference is not designed adequately to fulfill this data-gathering function. As outlined earlier, the foster parents are denied any right to present evidence or witnesses, the public official with whom they confer is already acquainted with the agency's version of the background facts, and the foster child whose future is at stake does not participate. Such a scheme fails to satisfy even the most minimal requirements of procedural due process. Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970). We do not understand the defendants seriously to claim otherwise.

Rather, the state argues that any constitutional defect is remedied by the post-removal "fair hearing" provided under N.Y.C.R.R. § 450.14. We disagree. See Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972). It is, at the least, paradoxical to suggest that a hearing designed to forestall the hasty and ill-advised separation of a foster child from his foster home can occur after that separation has already taken place. We are unpersuaded by defendants' contention that a decision by the hearing examiner to reverse the agency's action and reunite the family effectively restores the status quo. Such a reunion may ameliorate but it cannot eradicate the injury caused by uprooting the child. Indeed, to the degree that implementation of the hearing examiner's decision requires the disruption of arrangements made in the interim, it may further exacerbate the child's sense of loss. It is in the best interests of the child that the risk of such dislocations be avoided or minimized.[13a/]

We find equally without merit intervenors' assertion that § 392 of the Social Services Law adequately protects the due process interests of the foster child. Enacted in 1971, § 392 provides for periodic review of the status of each foster child. One and a half years after being placed in foster care, and every two years thereafter, the Family Court is required to conduct a hearing upon notice to the biological parents, foster parents in whose home the child has lived for at least eighteen months, the child care agency to which the child has been surrendered, and "such other persons as the court may, in its discretion, direct." Following the hearing, an order must be entered incorporating one of four stated dispositional alternatives: that the child be continued in foster care, that he be returned to his natural parents, that proceedings be instituted legally

to free him for adoption or, if legally free already, that he be placed for adoption with specified individuals.

Intervenors' contend that the above procedure, when coupled with the continued jurisdiction of the Family Court, Social Services Law § 392(10), fully satisfies constitutional requirements. We do not agree. Cf. Boone v. Wyman, 295 F.Supp. 1143 (S.D.N.Y. 1969), aff'd. 412 F.2d 857 (2d Cir. 1969), cert. denied 396 U.S. 1024 (1970).

First, and most obviously, § 392 offers no comfort whatsoever to the child in foster care for less than eighteen months. Second, intervenors' reasoning appears to rest upon an unjustifiably expansive interpretation of the scope of § 392. In In re W., 35 N.Y.S.2d 245, 248 (Fam. Ct. N.Y. Co. 1974), the court concluded that the power to direct the child to be continued in foster care did not encompass the authority to order that the child be maintained in any specific foster home.

Third, and most fundamentally, intervenors assume an identity of interest between foster parent and foster child which we are unwilling to accept as we have already indicated by the appointment of separate counsel at the outset of this litigation. The continuing jurisdiction of the Family Court constitutes a safeguard against arbitrary state action only if the proposed removal of the foster child is brought to the court's attention. Intervenors posit that the foster parents will perform this function. They may well be correct in the majority of cases. But we decline to rest the rights of the foster children upon the shoulders of foster parents who, however well-meaning, have a personal involvement and perhaps a financial interest[14/] which may color their conduct. If a hearing is required, as we hold it is, it is required in all cases and cannot be made to depend upon the initiative of third persons.[15/]

A similar flaw taints the amended regulations promulgated by New York City during the pendency of this action. In most other respects, however, New York City's revised procedures represent a significant improvement over the agency conference and post-removal hearing envisaged by N.Y.C.R.R. § 450.14 and already discussed.

As of July 1, 1974, New York City has provided, at the foster parents' request, as a substitute for or supplement to the agency conference, a pre-removal "independent review" conducted "in accordance with the concept of due process." Its salient features, as set forth in an internal memorandum of August 5, 1974, are as follows: (1) the review is heard before a supervisory official who has had no previous involvement with the decision to remove the child; (2) both the foster parents and the agency may be represented by counsel and each may present witnesses and evidence; (3) all witnesses must be sworn, unless stipulated otherwise, and all testimony is subject to cross-examination; (4) counsel for the foster parents must be allowed to examine any portion of the agency's files used to support the proposal to remove the child; (5) either a tape recording or stenographic record of the hearing must be kept and made available to the parties at cost; and (6) a written decision, supported by reasons, must be rendered within five days and must include a reminder to the foster parents that they may still request a post-removal hearing under N.Y.C.R.R.§ 450.14.

While the amended regulations represent a considerable improvement over previous procedures, we note certain deficiencies still present in New York City's current practices. First, as alluded to above, the "independent review" now afforded by New York City is available only upon

the affirmative request of the foster parents. We reiterate that such a restriction is inconsistent with our holding that it is the child's right to avoid arbitrary dislocations which necessitates a hearing. Whatever hearing is provided should be provided as a matter of course.

Second, New York's amended regulations have no applicability whatsoever when the child is to be returned to his biological parents. We see no basis for this distinction which, we believe, erroneously confuses the standard by which evidence is to be judged and the process by which it is gathered. No matter where he is to be placed, a well informed decision cannot but help to promote the child's "best interests," which all parties seek to advance.

Third, it is unnecessary and likely counterproductive to provide duplicate hearings, one pre-removal and a second after the event. We recognize that New York City was operating within the constraint of a statewise regulation, N.Y.C.R.R. § 450.14, which it had no authority to abrogate. We note, however, that the welfare of the child is best served by a speedy and final decision as to his fate.

Fourth, participation in New York City's "independent review" is limited to the foster parents and the agency representative. In order to insure that all relevant information is presented to the hearing examiner, the child and biological parent should be heard as well. Moreover, it may be advisable, under certain circumstances, for the agency to appoint an adult representative better to articulate the interests of the child. In making this determination, the agency should carefully consider the child's age, sophistication and ability effectively to communicate his own true feelings.

It is not, however, necessary that the chosen representative be an attorney. "The insertion of counsel ...

would inevitably give the proceeding a more adversary cast," Wolff v. McDonnell, 418 U.S. 539, 570 (1974), which as Mrs. Buttenwieser points out, might well impede the effort to elicit the sensitive and personal information required. Thus, we do not hold that a trial-type hearing, such as that now provided in New York City, is constitutionally requisite. See Morrissey v. Brewer, 408 U.S. 471 (1972). Indeed, we are reluctant to impose any pre-ordained structure upon the endeavor of trained social workers to evaluate the often ambiguous indices of a child's emotional attachments and psychological development. Rather, we believe the sounder course is to allow the various defendants--state and local officials--the first opportunity to formulate procedures suitable to their own professional needs and compatible with the principles set forth in this opinion.

In summary, therefore, we conclude that New York Social Service Law §§ 383(2) and 400, and N.Y.C.R.R. § 450.14, as presently operated, unduly infringe the constitutional rights of foster children. Defendants are enjoined from removing any foster children in the certified class from the foster homes in which they have been placed unless and until they grant a pre-removal hearing in accord with the principles set forth above. Of course, our decision today does not in any way limit the authority of the State to act summarily in emergency situations. Family Court Act § 1021.

The court thanks Mrs. Helen L. Buttenwieser for her valuable assistance as assigned counsel.

Order to be taken on submission.

Dated: March 29, 1976.

J. EDWARD LUMBARD
United States Circuit Judge

ROBERT L. CARTER
United States District Judge

FOOTNOTES

1/ Pursuant to the provisions of 28 U.S.C. §2281, this three judge court was convened to consider plaintiffs' non-frivolous constitutional claims.

2/ In recognition of the independent position advanced by Mrs. Buttenwieser, the term "plaintiff" will be used throughout this opinion to refer only to OFFER and the foster parents although the foster children were also named in the complaint.

2a/ In a separate order, filed concurrently with this opinion, Judge Carter has granted the motion of both plaintiffs and intervenors for class certification. The following parties are thus represented in the instant litigation: All foster parents who have had a foster child live with them continuously for over one year; all foster children who have lived continuously with their foster parents for over one year; and all natural parents who have voluntarily placed children in foster care.

3/ As will be discussed more fully below, New York City has revised its procedures during the course of this litigation.

4/ Authorized agency is defined in New York Social Services Law § 371 (10). It includes any local public welfare children's bureau, such as the defendants New York City Bureau of Child Welfare and Nassau County Children's Bureau, and any voluntary child-care agency under the supervision of the New York State Board of Social Welfare, such as the defendant Catholic Guardian Society of New York.

5/ In October 1974, the New York State Department of Social Services prepared Program Analysis Report No. 56, entitled "Time Spent in Care by Children Served in the New York

State Foster Care Program 1973." The report calculated that "[t]he median length of stay for dependent and neglected children in foster care at the end of 1973 was 4.30 years," at p. 13. This raw statistic was placed in context by Prof. David Fanshell of the Columbia University School of Social Work who testified on the basis of his own longitudinal study that the probability of a foster child being returned to his biological parents declined markedly after the first year in foster care. Professor Fanshell's study, conducted over a five year period, revealed a decline in discharge rate, as follows:

First year -----	24%
Second year ----	13%
Third year -----	8%
Fourth year ----	9%
Fifth year -----	7%

6/ Foster parents boarding children in their home must be licensed annually by an authorized agency pursuant to a legislative scheme set out in New York Social Services Law § 375, et seq.

7/ See note 5, supra.

8/ "The Court has frequently emphasized the importance of the family. The right to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights.' May v. Anderson, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has

found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)." Stanley v. Illinois, 405 U.S. 645, 651 (1972).

9/ In Stanley, the Supreme Court invalidated a provision of Illinois law which made the children of unwed fathers wards of the State upon the death of the mother. The Court held that, absent a hearing, the state was prohibited from presuming that the father would be an unfit parent merely because he had never married.

10/ The defendant Catholic Guardian Society currently pays foster parents $155 per month for each foster child boarded in their home, in addition to an allowance for clothing, medical and dental expenses. This amount is typical of that paid throughout the state.

11/ Plaintiffs have introduced affidavits from similarly eminent experts equally fervent in their support of the concept of the "psychological family."

AMENDED

11a/ Judge Pollack concludes his dissenting opinion with the observation that Social Services Law § 383(3) already "embodie[s] through the right of intervention" the requirement that a pre-removal hearing be provided if the foster child has lived with his foster parents for more than two years. This statement is incorrect. An examination of § 383(3) plainly reveals that while it grants to foster parents the right to intervene in any "proceeding" concerning the custody of foster children who have resided with them for twenty-four months or longer, it does not purport to create any substantive entitlement to a "hearing" or "proceeding" not elsewhere provided. Judge Pollack's contrary interpretation of the statutory language is moreover belied by the current practices of the defendants. Furthermore, the right to intervention granted by § 383(3) extends to the foster parents only and not to the children themselves.

We therefore emphasize once again that, with the exception of the recently amended regulations in effect in New York City, it is presently the law throughout New York State that a pre-removal hearing is unavailable regardless of the duration of the foster relationship being terminated.

12/ Our disposition of this case makes it unnecessary to decide the claim of the foster parents that the challenged statutes and regulations deprive them of the equal protection of the laws.

13/ Accordingly, we see no basis for intervenors' doomsday projection that biological parents who might otherwise entrust their children to the foster care system will be discouraged from doing so, to the detriment of the child, by the decision in this case.

13a/ Nor do we find anything to the contrary in the Supreme Court's recent holding that an evidentiary hearing is not required prior to the termination of disability benefits. Mathews v. Eldridge, 44 U.S.L.W. 4224 (February 24, 1976). Writing for the majority, Justice Powell emphasized the limited and financial nature of the deprivation there suffered by the plaintiff and the necessarily heavy reliance by the agency on medical documentation in reaching its decision. In contrast, the emotional trauma felt by a young child moved from a familiar home is pervasive and potentially devastating. Moreover, in determining whether the best interests of the child would better be served by his removal to another foster family, the social worker must weigh and evaluate a "wide variety of information," much of it subjective and some of it biased. 44 U.S.L.W. at 4232. A hearing provides the procedure for gathering and evaluating such data, thereby minimizing the risk of error.

14/ See note 10, supra.

15/ It is for this reason that we are unable to agree with intervenors' assertion that a constitutionally adequate recourse is provided the foster parents through a petition for habeas corpus or a petition for custody under Family Court Act § 651, even assuming, arguendo, that the above remedies would be available to a foster parent prior to the removal of the foster child.

Amended
3/22/76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U. S. DIST. COURT
FILED 3-22-76
S. D. OF N. Y.

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DORTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

-v-

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenors-Defendants.

O. pinion # 44104

DISSENTING OPINION

74 Civ. 2010

Before LUMBARD, Circuit Judge, and POLLACK and CARTER, District Judges.

AMENDED

POLLACK, District Judge (dissenting):

This is a suit seeking declaratory judgment that New York Social Services Law §§ 383(2) and 400 and Title 18, New York Codes, Rules, and Regulations (N.Y.C.R.R.) § 450.14 are unconstitutional on their face and as applied and seeking injunctive relief against their enforcement. The complaint is grounded on allegations that the sections, which prescribe procedures for the separation of foster children from their foster parents, deprive plaintiffs of due process and equal protection in violation of the Fourteenth Amendment. For the reasons shown hereafter the complaint must be dismissed.

The present statutory scheme, applicable throughout most of the state, provides that the local Public Welfare Department or any authorized private agency acting on its behalf may, at any time up to two years after a child has been placed in foster care, in its discretion and on ten days' written notice, order the removal of any foster child from the foster home in which he or she has been placed. SSL §§ 383(2), (3), 400 (1976 Supp.). Following notice of the impending removal, the foster parents may request a conference with a social services official and are given the reasons for removal and have an opportunity to express their views thereon. The child may not be removed from the foster home until three days after the conference. Written notice of the decision must be sent to the foster parents no later than five days after the conference which must contain advice of their right to appeal to the Department. N.Y.C.R.R. § 450.14(a-e). A decision to remove may be appealed to the Department, by "any person aggrieved", and the Department must review the case, give the appellant an opportunity for a fair hearing and render a decision within thirty days. SSL § 400(2)(1976 Supp.). A foster parent has been held to be an "aggrieved person" and where administrative remedies are finally exhausted, Court review is available by way of an Article 78 proceeding, CPLR 7800 et seq., before the New York Supreme Court. In re W, 77 Misc.2d 374, 355 N.Y.S.2d 375 (Family Ct. N.Y. Co. 1974).

AMENDED

Additionally, after 24 months of foster parentage the foster parents are granted the statutory right to "intervene" in any proceeding involving the custody of the child. SSL § 383(3)(1976 Supp.). Habeas corpus review is also presumably available at the instance of either the foster parent or the foster child. N.Y. CPLR §§ 7001 et seq.[1/]

The foster-parent-plaintiffs contend that these procedures deprive them of "liberty and property" interests without due process of law. The specific liberty interest which they assert is the right to familial privacy.

Plaintiffs insist that after one year of foster care, no child should be removed from a foster home without prior notice and an adversary hearing because emotional attachments have formed by that time which the state should not be at liberty arbitrarily to upset.

Plaintiffs-foster-parents initially sought to represent, as "next friend," the interests of their foster children as well. However, to forestall any possible conflict of interest, Judge Carter appointed Helen L. Buttenwieser as independent counsel for the foster children. In that capacity she has consistently argued that the foster parents have no constitutionally cognizable interest independent of those of the foster children and that an adversary hearing is not the proper forum to determint the "best interest of the child."

The plaintiffs-foster parents, in attempting in this action to obtain rights to certain procedures before a child may be removed from their home, no matter what the circumstances of the foster parents' home, are in effect seeking legislative relief.

Since the commencement of this law suit, New York City has revised its removal procedures when the child is to be placed somewhere other than with its own parents. These new procedures grant to foster parents most of the procedural protections requested by plaintiffs in this law suit: a foster parent receives detailed notice of the intent to remove a child, the reasons for the intended removal, and the right to a fair hearing by the City's Department of Social Services. The foster parents have access to Agency reports to be used at the hearing. Foster parents can present and cross-examine witnesses. The Agency determination must be based only on the record; its written decision must be served within five days of the hearing; and the child cannot be moved in the interim. A recording of the hearing is made and is available at cost.

All members of the Court agree that there is no merit in plaintiffs' argument that the realities of the foster care system, as presently administered in New York State, justify the finding of an expectation akin to a "property interest" that their role as foster parents will not be abruptly and summarily terminated. See Board of Regents v. Roth, 408 U.S. 564 (1972). Each foster parent signed, upon assuming responsibility for his or her respective foster child, a contract which reserves to the Agency the right to recall the child "upon request, realizing that such request will only be made for good reason."[2/]

Moreover, plaintiffs' assertion that the foster home is entitled to the same constitutional deference as that long granted to the more traditional biological family because recent studies conclude that the "family" can best be conceived as a psychological entity, presents a novel question and an interesting social debate. The plaintiffs seemingly ask this Court to extend to them the due process protection afforded to the biological father

of an illegitimate child in Stanley v. Illinois, 405 U.S. 645 (1972). Such an extension would adopt a principle that has long been anathema to the State's foster care policies. The psychological parent/child relationship is an amorphus one, not something that can be precisely defined or explained. The New York Courts have virtually unanimously refused the notion of "common law adoption" and have stated that, in absence of a statutory scheme, adoption -- that is the means whereby the status or relationship of parent or child is created between persons not so related by nature -- is not permitted. Matter of Malpica-Orsini, 36 N.Y. 2d 568, 570 (1975); Landon v. Motorola, Inc., 38 A.D. 2d 18 (3d Dept. 1971).[3/]

Having decided that the foster parents have no entitlement to their foster children, the Court declines to decide the debate surrounding the plaintiffs' requested extension of Stanley v. Illinois, supra; an extension which would invest plaintiffs with a "liberty" interest either in the children or the relationship itself. Instead of entering that debate, the Court departs from the better part of plaintiffs' claims, focused as they are on allegations of unconstitutionality from the viewpoint of the foster parents. The Court then rests its decision on a characterization of the foster children's interest that has been denied by the children's representative, Mrs. Buttenwieser. The Court's opinion anticipates a question of constitutional law in advance of the necessity of deciding it. It holds over the objection of the representative of the children in this suit that the foster children have a "liberty" interest in their relationship with the foster parents. The position of the children taken by the Court is espoused only by the foster parents who have no standing to assert the children's interest.[4/] No one with standing to claim that the

children require the due process protection sought herein is making that claim and, therefore, on well-settled principle it is not necessary or appropriate to reach that issue.

> The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioners, 113 U.S. 33, 39; Abrams v. Van Schaick, 293 U.S. 188; Wilshire Oil Co. v. United States, 295 U.S. 100.
> 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to the decision of the case.' Burton v. United States, 196 U.S. 283, 295 -- Ashwander v. Valley Authority, 295 U.S. 288, 346-7 (1936)(Brandeis, J. concurring).

On the basis of its resolution of this anticipated question the Court decides that the preremoval procedures presently employed by the State are constitutionally defective in that a child is entitled to a hearing "whenever and as soon as the child has been placed in a foster home for long term care or whenever, for any reason, he has remained in a foster home for a period of one year or more." Pursuing this result which has every earmark of legislative action, the Court rules that "defendants are enjoined from removing any foster children from the foster homes in which they have been placed for long term care or in which they have lived for more than one year unless and until they grant a pre-removal hearing."*/

Realizing that it is moving into unchartered seas, the Court states "we are reluctant to impose any pre-ordained structure upon the endeavor of trained social workers to evaluate the often ambiguous indices of a child's emotional attachments and psychological development. Rather, we believe the sounder course is to allow the various defendants -- state and local officials -- the first opportunity to formulate procedures suitable to their own professional needs and compatible with the principles set forth in this opinion."

*/ The Court's draft opinion was as quoted above. It has since limited its holding to apply to only those foster children who have resided with one set of foster parents for at least a year. The dissent is nonetheless the same.

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This result will undoubtedly come as a surprise, if not a shock, to the parties. No one has contended for the view reached in the Court's opinion, except possibly to touch on the subject matter tangentially. The parties should certainly have been given a hearing (a briefing opportunity) on the point made by the opinion. They should have been alerted to the possibility that the Court might undertake to consider the "unconstitutionality" of the present procedures from the viewpoint of the foster children whose representative was not asserting any such contention.

If the Court must reach the interest of the children, it must face a situation in which at every step in the foster care system (whether before or after the 24 month period) the child is represented only by the State or by the foster parents. He receives no notice and has no independent representative at any stage; in short, he has no independent role. Therefore, if the question were properly presented, the Court would have to decide whether or not the State, in its parens patriae capacity, acts as a sufficient representative for the child and whether or not the Due Process Clause mandates an adversarial hearing for foster children.

Since an independent representative for the child will inevitably be required, the Court has imposed on the delicate system of foster care an inapposite model for the application of the Due Process Clause; a model which requires the balancing of the individual's apparent need for procedural safeguards and the State's apparent need for summary action. 6/

The very structure of the State's foster care system belies the applicability of this model. In a system that at least purports (and the evidence herein shows that it actually does) represent "the best interests of the child" there can be no such facile distinction between the interest of the child, on the one hand, and

that of the State, on the other. Unlike the traditional context in which the Due Process Clause has been litigated, there is no necessary opposition between the child and the State here. The State's professional social workers should not so easily be rejected as adequate representatives for foster children (if in this context the Due Process Clause requires strict "representation" at all). Their representation of those children has simply not, on the hearing of this case, been shown to be so inadequate as to require the introduction of a third party to represent the child.

The interests involved in this system of child care are too sensitive, too inchoate, to fit this old due process model; and there seems little doubt that this case presents a striking example of the need for flexibility in the application of the Due Process Clause.[1/] Neither the Court's adherence to the old Due Process approach by requiring an independent representative, nor its refusal to provide further guidelines for the type of hearing it envisions taps the potential for such flexibility.

If the Court has, in fact, improperly required a third party to represent the child, then the remainder of its analysis can only be described as legislation. In holding that the child's interest requires that the foster parents have a formal voice in any decision to remove the child after a year of foster parentage or whenever the child is placed with them for "long term care," the Court first undertakes to express a social policy preference for a one year rather than the present statutory two year period, and then hedges by promulgating a vague standard (as yet undefined in this system) apparently meant to test foster parent-child relationships from their incipiency. There is no support for such a use of the Fourteenth Amendment.

Rather than relying on the disinterested social judgment of professional social workers acting under the aegis of well-conceived

tried and tested statutes, the Court's decision embroils the child in legalistic, psychological theorism; leaving the child a pawn in a game from which the child should be spared. No evidence has shown that the present procedures are conducive to or have resulted in hasty or ill-advised separations from the viewpoint of the foster child.

The right of cross-examination and discovery procedures, which would presumably now be afforded to foster parents after one year, have not been shown to be in the best interests of the child.

I do not imply in any wise that a child should not have the right to be heard -- to participate. That is not what is at stake. The only question before the Court is whether layers of procedural obstruction should be afforded to the foster parents to impede judgments reasonably reached by concerned independent disinterested agencies and professionals by less starchy methods. The pre-removal conference and the procedures leading thereto are not in any instance shown to have been defective from the viewpoint of the foster child. It is unrealistic to expect that a pre-teenage child, for example, is to invoke the "hearing" contemplated by the majority decision. And if an appointed adult representative is needed to articulate the interest of the child -- the existing procedures accord the needed due process.

The State legislature which spawned the statutory scheme that makes the foster parent-child relationship possible has made the rational decision that until it is 24 months old this relationship can never be sufficiently strong to require pre-termination hearing protection. While not abdicating its constitutional responsibilities or improperly deferring to a state legislature, the Court should not overturn the legislature's decision absent adequate proof that it is irrational or unfair. In short, it can recognize the State legislature's superior fact-finding ability and it can agree with that legislature's decision without avoiding its

obligation to determine what does and does not satisfy the Due Process Clause.

The Supreme Court has warned against a return to the days of substantive due process.

> Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.... We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.... we refuse to sit as a 'super legislature to weigh the wisdom of legislation," [citation omitted] and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." [citation omitted].... The ... statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State.... Ferguson v. Skrupa, 372 U.S. 726, 729-732 (1963).

This warning applies equally well to the social as to the economic sphere. While (in the first two years of foster parentage) it may conceivably be wiser to hold a pre-termination hearing to hear the parties out, it is not, thereby, constitutionally required. The evidence has not shown that, during those first two years, the foster parents and the foster child are not afforded adequate due process. The choice of providing a pre-termination hearing after one year of foster parentage rather than the two year period now through the right of intervention, embodied in SSL § 383(3) is a choice that seems particularly legislative in character.

I would dismiss the complaint.

Milton Pollack

FOOTNOTES

1/ Under Social Services Law § 392 (1976 Supp.) the New York Family Court is required to hold a hearing to review the foster care status of any foster child after 18 months of continuous care in the same foster home and, then, at least every 24 months. The foster parents are made parties "entitled to participate in this proceeding." § 392(4)(1976 Supp.).

2/ The statutes outlined above and under attack here also fairly put the foster parents on notice of the State's right to summarily remove the child from the foster home within 24 months of foster parentage. Of course, the observations in the text above are principally relevant with respect to an assertion of an "entitlement" to the children or the foster parent-child relationship. Such a property-like interest is to be distinguished from an assertion of a "liberty" interest similar to that asserted in Stanley v. Illinois, 405 U.S. 645 (1972).

3/ The Appellate Division of the Second Department has recently refused to reverse a Trial Term decision ordering two of the plaintiffs in this action to return their foster children to their natural mother. State of New York ex rel. Wallace v. Lhotan et al., N.Y.L.J. March 1, 1976, p.2, col. 1 (2d Dept., Feb. 23, 1976), affirming, 48 A. D.2d 665 (Sup. Ct. Nassau Co.1975). In that decision the Court discussed part of the rationale behind the rejection of the concept of common-law adoption in the case of foster parents.

> .... the foster parents must make a serious attempt to encourage, not discourage, the improvement of relations between the children under their charge and a mother who is trying to reestablish the bonds of family love and concern. A portion of the love that foster parents have for the children must be directed towards easing their return to their natural parent. Whatever circumstances will rend the family fabric, it should not be the result of actions of the foster parents, who have taken on their delicate responsibilities on the solemn promise to do otherwise.

So it is that foster parents are charged with the duty to avoid forming the very psychological relationship which they present here as a justification for a pre-removal hearing.

4/ The Supreme Court has frequently expressed the general rule that one person does not have standing to assert the constitutional rights of another. United States v. Raines, 362 U.S. 17, 21-22 (1960); Tileston v. Ullman, 318 U.S. 44, 46 (1943). See generally, Eisenstadt v. Baird, 405 U.S. 438, 443-46 (1972); Barrows v. Jackson, 346 U.S. 249 (1953). In light of the representation of the children by Mrs. Buttenweiser and the Court's holding that an independent representative is required for the foster child at the due process hearing it orders, there can be no grounds for waiving this general rule in this case.

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4/ continued.
By its appointment of Mrs. Buttenweiser the Court has recognized the severability of the claims of foster parents and the foster children. See Rule 17(c), Fed. R. Civ. P.; Wright and Miller, Federal Practice and Procedure, § 1570 at 774 (1969). Therefore, the foster parents cannot now be invested with standing as an exception to the Raines rule on the grounds that their interests are not severable from those of the children. See Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599, 606 et seq. (1962); Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1974).

The Court's recognition of some interest in the child other than that asserted by their independent representative herein betrays a significant confusion over the question of when a child does and does not require independent representation under the Due Process Clause. Apparently a child requires an independent representative in the hearing required by the Court despite the views of the children's independent representative in the hearing of this action.

In short, allowing foster parents standing here to assert the interest of the child seriously undermines the Court's later finding that the child requires representation independent of the foster parents at a due process hearing.

5/ This principle of constitutional jurisprudence is precisely the authority invoked by the Court in its avoidance of the debate surrounding plaintiffs' analogy to Stanley v. Illinois, supra. See generally Rescue Army v. Municipal Court, 331 U.S. 549, 568-75 (1947).

6/ See Bell v. Burson, 402 U.S. 535 (1971); Richardson v. Perales, 402 U.S. 389 (1971); Note, Specifying the Procedures Required By Due Process: Toward Limits on the Use of Interest Balancing, 88 Harv. L. Rev. 1510 (1975).

7/ " .... the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.... what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action .... '[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions....' Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162-163 (concurring opinion)." Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 894-895 (1961); Frost v. Weinberger, 515 F.2d 57, 66 (2d Cir. 1975). See Friendly, H.J., "Some Kind of Hearing", 123 U.Pa. L. Rev. 1267 (1975); Frankel, M. The Search for Truth: An Umpireal View, 1031, 1036 (1975).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

-v-

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenors-Defendants.

ORDER AND JUDGMENT

74 Civ. 2010

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This cause having come on to be heard on plaintiffs' application for injunctive and declaratory relief, and this court having held a hearing on March 3, 1975, and briefs and depositions having been submitted, and a decision having been filed on March 22, 1976, it is hereby

ORDERED and adjudged that:

(1) New York Social Services Law §§ 383(2) and 400, and N.Y.C.R.R. § 450.14 as presently applied are unconstitutional, in violation of the constitutional rights of foster children in the certified class; and

(2) Defendants are permanently enjoined from removing or authorizing the removal of any foster children in the certified class from foster homes in which they have lived continuously for more than one year, without notice and hearing at which the foster parents, the foster child and the biological parents may present any relevant information to the administrative decisionmaker charged with determining the advisability of such removal; and

(3) At hearings such as referred to in the preceding paragraph, defendants shall appoint a disinterested adult to represent the child whenever the defendants, in their informed discretion, determine that the child's age, sophistication and ability effectively to communicate his or her own true feelings warrant such an appointment; and

(4) Said hearings need not be held when the foster child is to be removed pursuant to the order of any court of competent jurisdiction, or at the request of the foster parent; and

(5) Said hearings need not be held in emergency situations when the health or welfare of the foster child is imminently threatened; and

(6) Procedures appropriate to the circumstances, and consistent with the foregoing, shall be promulgated and published by the defendants; and

(7) The effective date of this order and judgment shall be stayed for 30 days to permit application to a Justice of the Supreme Court of the United States for a further stay pending appeal to the Supreme Court of the United States; and

(8) All motions for rehearing are denied except that the clerk of the district court is directed to strike from the last page of the opinion the words: "Family Court Act § 1021."

Dated: April 14, 1976.

J. EDWARD LUMBARD
United States Circuit Judge

MILTON POLLACK
United States District Judge

ROBERT L. CARTER
United States District Judge

I dissent from the foregoing except paragraphs #7 and #8

Milton Pollack
United States District Judge

UNITED STATLS DISTRICT COURT
SOUTHER DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,

Plaintiffs,

-against-

JAMES DUMPSON, et al.,

Defendants.

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON; SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenors-Defendants

- - - - - - - - - - - - - - - - - - - -x

74 Civ. 2010 RLC

NOTICE OF MOTION

TO: HELEN L. BUTTENWIESER, Esq.
Office and P.O. Address:
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ELLIOT HOFFMAN, Esq.
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JOHN F. O'SHAUGHNESSY, Esq
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JAMES GALLAGHER, Esq.
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MARTTIE L. THOMPSON, Esq.
LOUISE GRUNER GANS, Esq.
Office and P.O. Address:
Community Action for Legal Services
335 Broadway, New York, New York 10013

PLEASE TAKE NOTICE that, based upon the annexed affidavit of MARCIA ROBINSON LOWRY, and the annexed memorandum of law, and

all proceedings previously had herein, the undersigned will move this court at a Motion Term thereof to be held on the 4th day of June, 1976, at 10 A.M. in Room 318 of the United States Courthouse, Foley Square, New York, New York, for an order pursuant to Rule 17 (c) of the Federal Rules of Civil Procedure substituting new counsel for plaintiff foster children or in the alternative appointing a guardian ad litem for plaintiff foster children whose constitutional rights have been declared by the three-judge statutory court in an opinion in the above-captioned action dated March 22, 1976, to represent those constitutional rights and interests in all further proceedings, including appeal to the United States Supreme Court, and for such other and further relief as this court deems just and proper.

Dated: New York, New York
May 21, 1976

Yours, etc.

Marcia Robinson Lowry

Marcia Robinson Lowry
Children's Rights Project
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Attorney for Plaintiff
Foster Parents

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,

Plaintiffs,

-against-

JAMES DUMPSON, et at.,

Defendants.

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON; SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenor-Defendants

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARCIA ROBINSON LOWRY, being duly sworn, deposes and says:

1. I am the attorney for plaintiff foster parents in the above-captioned action, and director of the Children's Rights Project of the New York Civil Liberties Union.

2. On May 9, 1974, I filed the complaint in this case, on behalf of foster parents and foster children, challenging the constitutionality of New York statutes and a state-wide procedure for the removal of children from foster homes.

3. On October 25, 1974, counsel for all parties were notified by Judge Robert L. Carter that the court had decided to appoint separate counsel to represent the plaintiff foster children. On October 28, 1974, Judge Carter confirmed by letter that he was appointing Helen L. Buttenwieser, Esq., to represent the plaintiff foster children.

4. By order to show cause dated November 7, 1974, I moved for an order pursuant to Fed. R. Civ. P. 17(c) continuing myself as counsel to the plaintiff foster children and requiring the plaintiff foster parents to secure substitute counsel, or, in

the alternative, for an order appointing Dr. Kenneth Clark as guardian ad litem to seek independent counsel for the plaintiff foster children.

5. That motion was based in part on my belief that the attorney this court appointed to represent the children(by this court),Ms. Buttenwieser, had a possible conflict of interest with regard to the issues in this litigation. (See affidavit dated November 6, 1974, annexed as Exhibit A., paragraphs 29-32.)

6. Judge Carter, in a decision dated December 10, 1974, denied the motion, based in part on the court's recognition of its duty under Rule 23(a)(4), Fed. R. Civ. P., to "assure itself that counsel for the representative parties will prosecute the action vigorously on behalf of the class." (Opinion dated Dec. 10, 1974, annexed as Exhibit B., at p. 10)

7. The court noted that Rules 17(c) and 23(a)(4), Fed. R. Civ. P., "provide ample authority for the appointment of separate counsel upon a determination that such appointment is necessary to insure adequate representation of the class of children." (Exhibit B., p. 16), and that the court should determine "whether counsel for the class may not be willing to press all possible claims of the class." (Exhibit B., p. 18)

8. Ms. Buttenwieser, as court-appointed counsel for the plaintiff foster children, has made it clear throughout her participation in this case that she does not believe that the New York statutes, regulation, and procedures at issue violate the constitutional rights of foster children. On behalf of plaintiff foster children, she served an answer to the complaint, filed a memorandum of law arguing that the case raised no cognizable constitutional issues, and filed a separate application for a stay of judgment with the United States Supreme Court. (Annexed as Exhibit C.)

9. This court has certified as a class in the present case "all foster children who have lived continuously with their foster parents for over one year." This court has also ruled in its decision dated March 22, 1976, that the constitutional rights of members of that class are violated by the New York procedures for removing children from foster homes.

10. Counsel for the city and state defendants, and defendant-intervenors have all indicated that they will appeal this court's decision to the United States Supreme Court.

11. Unless this court acts to appoint new counsel for the class of foster children whose constitutional rights have been violated, the interests of that class will be presented to the court only by the foster parents.

12. Plaintiff foster parents are and have been concerned in this case with the welfare and interests of foster children. Plaintiff foster parents believe that the constitutional rights and interests of foster children were violated by the New York statutes and procedure for removing foster children from foster homes. This court agreed.

13. Plaintiff foster parents also believe that the foster children whose constitutional rights have been violated should have their interests represented before the United States Supreme Court, and in any subsequent proceedings in this case.

14. Therefore, as counsel to these plaintiffs, I urge this court to remove Ms. Buttenwieser as counsel for the plaintiff foster children and to appoint new counsel for the plaintiff foster children who will represent the constitutional rights and interests of foster children which this court held were violated by the New York statutes and procedures.

15. In the alternative, plaintiff foster parents urge this court to appoint a guardian ad litem (additional counsel) for the foster children, who will be charged specifically with representing those class members who Ms. Buttenwieser clearly will not represent, that is, those class members whose constitutional rights have been violated.

Marcia Robinson Lowry

MARCIA ROBINSON LOWRY

Dated: New York, New York
May 21, 1976

Sworn to before me
this 21 day of May, 1976

Christopher A. Hansen

CHRISTOPHER A. HANSEN
Notary Public, State of New York
No. 31-4603702
Qualified in New York County
Commission Expires March 30, 1978

EXHIBIT C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Appellants-Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Appellants-Intervenors,

DANIELLE and ERIC GANDY, RAFAEL SERRANO, and CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE on behalf of themselves and all others similarly situated,

Appellants-Plaintiffs,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTINE GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees.

APPLICATION FOR STAY PENDING DISPOSITION OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE THURGOOD MARSHALL, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

The Infant Plaintiffs, by HELEN L. BUTTENWIESER, their Court appointed attorney, joins with the Defendants

in applying for a stay pending disposition of appeal to the Supreme Court of the United States.

To lessen the burden on the Court, the Infant Plaintiffs have not undertaken to repeat certain formal parts of this application but have adopted, in toto, Defendants application for a stay, which application is attached hereto as an appendix.

ARGUMENT

THE IMPOSITION BY THE COURT BELOW OF A REQUIREMENT THAT THE REMOVAL OF A CHILD FROM THE FOSTER HOME IN WHICH HE OR SHE HAS RESIDED A YEAR OR MORE MUST BE PRECEDED BY AN ADVERSARY PROCEEDING IS CONTRARY TO THOSE CHILDREN'S BEST INTEREST, AND A STAY OF SUCH A REQUIREMENT SHOULD BE GRANTED.

Placement of children in foster homes, when remaining in their own homes is not feasible, is difficult.

At the turn of the century children who could not be maintained in their own homes were invariably placed in institutional settings. The frequency with which the emotional development of the child was impaired and impeded resulted in a search for a way of supplying children needing care away from home with a setting which approximated the child's continuing need for parental figures.

Children in well-to-do or reasonably comfortable families were accommodated with relatives and friends, or substitutes for parental care was purchased.

Children from the less affluent families, however, had no such resources, and it became necessary for the State to purchase for these less affluent children the

temporary familial care and nurturing they required.

Because of the difficulty in evaluating the needs of the children, locating appropriate foster families and monitoring the relationship between the children and their foster parents, it became necessary to train persons to become expert in these areas, and to intrust to these experts the delicate task of determining the appropriateness of these placements and the advisability of continuing them.

Additionally, there developed the problem of convincing the natural parents, who were fearful that their children might not be returned to them, that placement in a foster home for the temporary period that the family difficulties required would not impede the return of their children to them.

The present procedures for monitoring the placements and for making decisions as to the removal of children from their foster homes, either to return to their natural parents, or for placement elsewhere is designed to maximize the available strengths and to minimize delays.

With children, particularly the very young, time is of the essence, and a procedure which inevitably lengthens the decision making process without adding to the information otherwise available is a deliberate deprivation to the children involved.

Adversary proceedings which require concurrent availability of a number of persons - i.e. foster family, natural parents, agencies and their respective attorneys, many of whom are past masters of delaying tactics - as well as the necessity for scheduling a hearing at a time when

the hearing officer and stenographer can be present; all of which is usually preceded by requests to examine confidential records kept by the agencies concerning the child involved, access to which by the "parties" will not serve to add to the knowledge of the decision-maker, certainly cannot be deemed to be in a child's best interest.

That adversary proceedings are not required in "every conceivable case of government impairment of a private interest" has already been determined by this Court in Stanley v. Illinois 405 US 645, 31 Led 2d 1230, 1236, 81 S. Ct 1743.

IF HEARINGS WITH ALL PARTIES PRESENT ARE REQUIRED AS A PREREQUISITE TO REMOVAL OF FOSTER CHILDREN FROM THEIR HOMES, THEN ALL THE CHILDREN INVOLVED, ARTICULATE OR INARTICULATE, SHOULD BE ENTITLED TO AN ADVOCATE.

The Judgement and Order provides for the appointment of an advocate for a child whose meets certain qualifications (although it is not clear whether the advocate is to be appointed if the child is articulate or if the child is not articulate).

However, it is the contention of the attorney for the children that whenever an adversary hearing concerning the welfare of a child is held, that child, articulate or not, should have an advocate.

A stay is, therefore, inportant also to insure that no hearings should be scheduled without providing for proper advocacy for all children .

CONCLUSION:

A STAY OF THE DISTRICT COURT'S ORDER AND JUDGMENT SHOULD BE GRANTED PENDING DISPOSITION OF THE APPEAL TO THIS COURT.

Dated: New York, New York

May 7th, 1976.

Respectfully submitted:

Helen L. Buttenwieser

HELEN L. BUTTENWIESER
Court aprointed Attorney
for the Infant Plaintiffs
575 Madison Avenue,
New York, New York, 10022

Tel. (212) 826-1600.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al., : 74 Civ. 2010 RLC

Plaintiffs, :

-against- : AFFIRMATION

JAMES DUMPSON, et al., :

Defendants. :

NAOMI RODRIGUEZ, et al., :

----------X

STATE OF NEW YORK)
: ss:.
COUNTY OF NEW YORK)

HELEN L. BUTTENWIESER, an attorney duly admitted to practice in the State of New York, hereby affirms under penalty of perjury as follows:

I am the attorney for the infant Plaintiffs herein.

I make this affirmation in opposition to a motion made by Marcia Lowry, attorney for the adult Plaintiffs, requesting this Court to remove me as attorney for the infant Plaintiffs, a position I occupy at the request of this Court.

My opposition is based on a substantive disagreement with the mover's interpretation of the obligation placed on an attorney appointed by the Court.

The mandate of this Court requires me to protect

the rights of the infant Plaintiffs individually and as a class, whereas Ms. Lowry's contention is that I am limited to pressing for the adversary proceedings to which she alleges they are entitled.

Judge Carter, in his opinion of December 10th, 1974, states specifically that "the Court must assess the possibility that a child's needs and desires may be determined more effectively through examination by the trained personnel provided by state social welfare agencies then through an adversary hearing" (p.13).

Ms. Lowry contends, in a foot note in her moving affidavit, that my failure to consult the infants who are the named infant Plaintiffs demonstrates my lack of competence to represent the infant Plaintiffs as a class. She ignores Judge Carter's ruling that my obligation is to the class as a whole whose interests "may differ greatly from those of the named children" (p.15).

As the documents previously submitted by me will show, my position was, and still is, based on a firm belief that, though there are times when adversary proceedings are constitutionally required where infants are involved in a State proceeding, the procedures presently provided by the State and which are being administered by personnel trained for the purpose, are entirely adequate, and that it would be a disservice to the children to mandate the adversary proceedings required by the majority of the

Three Judge Court.

In addition to opposing Ms. Lowry's position on the substantive issue, I feel I should call the Court's attention to the fact that I do not believe that Ms. Lowry has any standing to make this motion if she is doing so as an individual.

If, on the other hand, she mades this motion on behalf of her clients, the adult Plaintiffs who have interests that are in conflict with those of the infant Plaintiffs, it is obvious that this motion is only an attempt to press for the adversary proceeding which will benefit her clients.

Furthermore, I would like to remind the Court that when Ms. Lowry previously moved to terminate my appointment as attorney for the infant Plaintiffs, on grounds that included the one that is asserted here, such motion was denied by Judge Carter. No appeal was taken from his ruling which appears to be res adjudicta on this issue

Dated: New York, New York

27th day of May, 1976

Respectfully

Helen L. Buttenwieser

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN; on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated, Plaintiffs, -against- JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTERAGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services, Defendants, NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated, Intervenor-Defendants	AFFIDAVIT IN OPPOSITION 74 Civ. 2010

State of New York)
) ss.:
County of New York)

Louise Gruner Gans, being duly sworn, deposes and says:

1. I am of counsel to Marttie L. Thompson, attorney for the Intervenor-Defendants herein. I make this affidavit in opposition to the motion of plaintiffs to remove Ms. Helen Buttenwieser as counsel for the children and appoint new counsel in her place, or in the alternative to appoint a guardian ad

litem or additional counsel for those children in the class certified by the Court, whom plaintiffs claim, "Ms. Buttenwieser clearly will not represent."

2. On behalf of intervenor-defendants, I strenuously oppose plaintiffs motion. The grounds for this opposition are as follows:

a. The issue raised by plaintiffs' motion have already been determined by the Court in the Decision and Order of Judge Carter, filed December 11, 1974. That Decision and Order reaffirmed the assignment of Ms. Buttenweiser as independent counsel for the children over the opposition of plaintiff foster parents and denied plaintiffs' motion for the appointment of a guardian ad litem for the children.

It hardly seems necessary to rehearse the Court's own opinion in detail. Suffice it to say that it was based on a recognition of a conflict of interest between plaintiff foster parents and their counsel, on the one hand, and the interest of the children on the other, which conflict was apparent from the foster parents' complaint. In the December 11, 1974 Order, this Court acknowledged that Ms. Buttenweiser had already filed an Answer on behalf of the children, the essence of which was to deny that any rights of children were violated by the statutes challenged by the foster parents. The Court was thus aware of the fact that Ms. Buttenwieser would not present the children's claim in the way it had originally been stated, when the Court went on to hold that the filing of a new pleading was appropriate (December 11, 1974 Decision and Order page 5) and rejected the argument that Ms. Buttenwieser's position on the merits of the case constituted a reason why she should not be appointed as counsel (Decision and Order December 11, 1974, page 17).

Further, plaintiff foster parents first undertook to

prosecute an appeal from Judge Carter's December 11, 1974 Decision and Order to the United States Court of Appeals for the Second Circuit and then abandoned the appeal. Their Notice of Appeal, annexed hereto as Exhibit "A", was filed on December 31, 1974. After securing a preference from the Circuit Court of Appeals, plaintiffs, to the best of my recollection abandoned the appeal a week prior to February 7, 1976, the date when their brief was due. A Stipulation that the appeal was "withdrawn without prejudice to any party's right to full appellate review at the conclusion of the district court proceedings" was entered into by all the parties and is annexed hereto as Exhibit "B".

b. More than one year later the issues raised by plaintiffs' motion were once more determined by the Court in Judge Carter's Decision and Order of March 22, 1976 granting the several outstanding motions for class action status and thus certifying a class of children represented by Mrs. Buttenwieser.

In the Decision and Order of March 22, 1976 (page 5) granting class certification to foster parents, parents and to the children Judge Carter expressly found that the requirement of FRCP Rule 23(a)(4) of fair and adequate representation of the Class' interest by the class representatives and their counsel was satisfied in the case of each of the certified classes. In this connection Ms. Buttenweiser was singled out for thanks and praise. To the extent plaintiffs suggest that Ms. Buttenweiser's representation of the children does not satisfy the requirements of FRCP Rule 23(a)(4) they are seeking to relitigate Judge Carter's decision and order of March 22, 1976. Yet plaintiffs have not sought to appeal that decision. Similarly, plaintiffs suggestion that there are really two classes of children, those whose constitutional rights were violated and those whose constitutional

rights were not violated by the statutes and Regulation challenged in this action is an attempt to undo the Court's class action order granted on plaintiffs own motion. Interestingly, plaintiffs do not explain how one would ascertain which children belonged in the two different classes. Intervenors opposed plaintiffs class action motion in this case. However a class of children has been certified. If the Court were now to accept the view that there was more than one class of children in this case then this action would in fact have to be decided de novo.

It is respectfully submitted that plaintiffs are foreclosed from relitigating the assignment of Ms. Buttenwieser as counsel for the children as well as the adequacy of representation she is providing for the class of children whom she represents; these are now the law of the case.

c. The basic issues raised by plaintiffs motion have not changed merely because the district Court ultimately adopted a view of the rights of children different from that advanced by Ms. Buttenweiser.

Judge Carter's opinion of December 11, 1974 made clear that the Court's purpose in assigning Ms. Buttenweiser as separate counsel for the children was to permit the children to have <u>independent</u> counsel - that is counsel not bound by conflicting loyalties to another party and <u>adequate representation</u> as required by Rule 23 (a) (4). The Court's purpose in appointing Ms. Buttenweiser was not to have Ms. Buttenweiser pursue on behalf of the children the claims plaintiff foster parents had raised on the children's behalf. Because foster parents and their counsel were in a conflict of interest situation they lost the ability to <u>control</u> the presentation of the legal claim of the children in the children's name. Thus, Ms. Buttenweiser was not <u>bound</u> by the legal position the foster parents had taken,

even though counsel for the foster parents continued to advance their view of the children's rights and interests.

The dilemmas inherent in providing representation for a large class of children of all ages was pointed out by Intervenor-Defendants in the Memorandum in Opposition to plaintiffs' motion to certify classes of foster parents and children. All that was and could be expected of Ms. Buttenwieser as counsel for the children is that she independently examine and express what she believed to be the best legal view of the interest of thechildren. That is all any single counsel for a class of children who are unable meaningfully to instruct their counsel can do; this is so whether the counsel is labelled as counsel or as guardian ad litem.

Plaintiffs apparently believe that just because the majority of the Court "gave" certain procedural rights to the children, that a counsel is required who would want those rights for them. Here plaintiffs are injecting their view that the procedures mandated by the Court are desireable as an absolute good, rather than the provisional result of litigation still subject to further review.

A counsel instructed by the Court to take a particular legal position for the children would not be independent counsel. Therefore, counsel for the children, free to disagree with all other parties, must also be free to disagree with the order and judgment of the Court, if she believes the procedures mandated by the Court are harmful to the children.

On the basis of all proceedings previously had in this case, the Court can be assured that all views of the rights of children, including that accepted by the majority of the three judge Court will be fully developed and presented in the Supreme Court of the United States.

Sworn to before me this
28th day of June, 1976.

DAVID M. MINGO
Notary Public, State of New York
No. 31-7704735
Qualified in New York County
Commission Expires March 30, 1977

Louise Gruner Gans.

Original filed
12/31/74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants.

74 Civ. 2010 RLC

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs herein hereby appeal to the United States Court of Appeals for the Second Circuit from the opinion and order of the Honorable Robert L. Carter, entered in this action on December 11, 1974, disqualifying counsel to the plaintiffs herein from further representation of plaintiffs Rafael Serrano, Danielle and Eric Gandy, and Cheryl, Cynthia, Patricia and Cathleen Wallace.

Dated: New York, New York
December 27, 1974

Marcia Robinson Lowry

Marcia Robinson Lowry
Peter Bienstock
Attorneys for Plaintiffs
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

To: Helen L. Buttenwieser, Esq.
575 Madison Avenue
New York, New York 10022

Stanley Kantor, Esq.
Office of the Attorney General
2 World Trade Center
New York, New York 10047

Elliot Hoffman, Esq.
Assistant Corporation Counsel
Municipal Building
New York, New York 10007

Jack Olchin, Esq.
Office of the County Attorney
of Nassau County
Nassau County Executive Building
West Street
Mineola, New York 11501

Louise Gans, Esq.
Community Action for Legal Services
335 Broadway
New York, New York 10013

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

75-7033

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

-against-

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants-Appellees.

FEB 28 1975

75-7033

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties to this appeal that the appeal initiated by Notice of Appeal dated December 31, 1974 is hereby withdrawn without prejudice to any party's right to full appellate review at the conclusion of the district court proceedings herein.

Marcia Robinson Lowry

Marcia Robinson Lowry
Peter Bienstock
Children's Rights Project
New York Civil Liberties Union
Attorneys for Appellants

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person so served to be the person mentioned and described in said papers as the _____ therein.
Sworn to before me this _____ day of _____ 19

LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the State of
New York
Attorney for Appellees Shapiro
and Lavine

By: Stanley L. Kantor, Esq.
Assistant Attorney General

W. Bernard Richland
ADRIAN BURKE, ESQ.
Corporation Counsel
Attorney for Appellees Dumpson
Beine and Dall

By: Elliott Hoffman, Esq.
Assistant Corporation Counsel

JOHN F. O'SHAUGHNESSY, ESQ.
County Attorney of Nassau County
Attorney for Appellee D'Elia

By: James Gallagher, Esq.
Assistant County Attorney

MARTTIE L. THOMPSON, ESQ.
Community Action for Legal Services
Attorney for Intervenor-Appellees

By: Louise G. Gans, Esq.

HELEN BUTTENWIESER, ESQ.
Court-Appointed Attorney for Appellees

SO ORDERED:
Without costs or disbursements

James L. Oakes
U.S.C.J.

Feb. 28, 1975

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therein.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,

Plaintiffs,

AFFIDAVIT IN OPPOSITION

-against-

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, et al.,

74 Civ. 2010 (RLC)

Defendants.

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ELLIOT P. HOFFMAN, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the office of the Corporation Counsel of the City of New York and I am responsible for the defense of the instant action. This affidavit is submitted in opposition to the motion by the attorney for the foster parents to remove the attorney for the foster children.

2. The reason for our opposition are similar to those set forth in the papers filed by our co-defendants.

3. However, we do wish to add that the disagreement with a decision of a court, particularly in a family law matter, has never been grounds for disqualification of counsel. In this regard we note that Mr. Lowry continued to represent the Wallace children on appeal despite

F76 174

the position on appeal having been found to be contrary to the children best interests by the New York Supreme Court.

ELLIOT P. HOFFMAN

Sworn to before me
this 3rd day of June, 1976

DONALD M. NUSSBAUM
Notary Public, State of New York
No. 31-4517265
Qualified in New York County
Commission Expires March 30, 1978

Donald M. Nussbaum

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUITY AND REFORM, et al., Plaintiffs, -against- JAMES DUMPSON, et al., Defendants, NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON; SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated, Intervenors-Defendants.	AFFIDAVIT IN OPPOSITION TO MOTION TO SUBSTITUTE COUNSEL 74 Civ. 2010 (RLC)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARK C. RUTZICK, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for defendants Bernard Shapiro and Abe Lavine in the within action, and this affidavit is submitted in opposition to the plaintiffs' motion for an order substituting new counsel for the class of plaintiff foster children or in the alternative appointing a guardian ad litem for that class.

2. The within motion is a renewal of a motion first brought on by the plaintiff foster parents more than one and one-half years ago, following the initial decision by Judge Carter to appoint separate counsel for the children. The current motion papers submitted by counsel for the foster parents present no new matters or arguments for the Court's consideration, and the opinion of Judge Carter dated December 10, 1974 should therefore control the Court's disposition of the motion.

3. Judge Carter held in his opinion of December 1, 1974:

> ". . .[T]here must be independent counsel whose sole commitment is to the children, and who is therefore free to advocate their interests vigorously even though they may conflict with the interests of some other party to this litigation". (Opinion at 13).

The Court then proceeded to designate Mrs. Helen L. Buttenweiser as independent counsel.

4. This opinion also noted "the Civil Liberties Union's apparent inability to appreciate, much less to share, this Court's concern over a potential conflict of interest between the foster parents and the children". (Opinion at 15).

5. In view of Judge Carter's finding of the need for independent counsel for the foster children, it is no more proper for the foster parents to seek removal of that independent counsel then it would be for the foster parents to seek removal of counsel for the State defendants because the foster parents disapproved of his view of the case. It is not within the realm of one party to seek removal of another party's counsel, and the foster parents' failure to grasp the anomaly of the current motion suggests that their attorney, after one and one-half years of litigation, still does not appreciate or share this Court's concern over the actual conflict of interest between the foster parents and children.

6. The suggestion by the foster parents that the decision of the Court below somehow alters Mrs. Buttenweiser's responsibilities as independent counsel is untenable. The obligations of the independent counsel for the children described

by Judge Carter do not end at the trial level, but continue through all the stages of appellate review. Counsel is not compelled to reverse her previous position simply because the case is now at the appellate level.

7. A substitution of counsel at this late date would also tend to frustrate speedy appellate review of this Court's decision, a matter of importance to all the litigants herein in view of the current stay granted by the Supreme Court of the United States, and of the importance of the issues raised in the decision of this Court.

8. In light of the foregoing, defendants Shapiro and Lavine respectfully request that this Court deny plaintiffs' motion.

/s/
MARK C. RUTZICK

Sworn to before me this
1st day of June, 1976

/s/
Assistant Attorney General
of the State of New York

S I R S :

NOTICE is hereby given that the defendants James Dumpson, Elizabeth Beine, and Adolin Dall hereby appeal to the Supreme Court of the United States from the order and judgment entered herein in the Office of the Clerk of the United States District for the Southern District of New York on April 14, 1976 wherein it is adjudged that New York Social Services Law §§ 383 (2) and 400 and N.Y.C.R.R. § 450.14 as presently applied are unconstitutional.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Yours, etc.,

W. BERNARD RICHLAND
Corporation Counsel of
the City of New York
Attorney for Defendants,
Dumpson, Beine and Dall
Office and P.O. Address:
Municipal Building
New York, N.Y. 10007

JUN 09 1976

By_____
CARL SANDERS

TO:

MARCIA ROBINSON LOWRY, ESQ.
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
Attorney for Plaintiffs
Organization of Foster Families
for Equality and Reform
Madeline Smith
Ralph and Christiane Goldberg,
on behalf of themselves and all
others similarly situated

HELEN L. BUTTENWIESER, ESQ.
575 Madison Avenue
New York, New York 10022
Attorney for Danielle
and Eric Gandy
Rafael Serrano, on behalf of
themselves and all others
similarly situated

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,

Plaintiffs,

-against-

JAMES E. DUMPSON, individually and as Administrator of the New York City Human Resources Administration, et al.,

Defendants.

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NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

74 Civ. 2010 (RLC)
(3 Judge Court)

S I R S :

NOTICE is hereby given that Bernard Shapiro and Abe Lavine, defendants in the above-captioned matter, hereby appeal to the Supreme Court of the United States from the final order and judgment of the three-judge court entered in this action on April 14, 1976 declaring §§ 383(2) and 400 of the New York Social Services Law and N.Y.C.R.R. § 450.14 unconstitutional as presently applied, and granting permanent injunctive relief, and defendants hereby appeal from each and every part of said order except so much as stays the effective date for 30 days.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
June 10, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Shapiro and Lavine
By

MARK C. RUTZICK
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7403

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated, Plaintiffs, -against- JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTERAGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services, Defendants, NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated, Intervenor-Defendants	NOTICE OF APPEAL 74 Civ.2010

NOTICE OF APPEAL
TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Naomi Rodriguez, Mary Robins, Dorothy Nelson Shabazz, and Lillian Collazo, Intervenor-Defendants above named, on behalf of themselves and all others similarly situated, appeal to the Supreme Court of the United States from the judgment and order of the three-judge district Court (Pollack, D.J., dissenting) entered in this class action on April 14, 1976, wherein the district Court declared

unconstitutional and enjoined the enforcement of New York Social Services Law Sections 383(2) and 400 and New York Codes Rules and Regulations (N.Y.C.R.R.) 450.14, to the extent said statutes and regulation were applied by Defendants to move children from foster homes in which they had been placed for "a year or more," without affording to the children, in every case, notice and a prior hearing with respect to the propriety of the proposed move.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Dated: New York, New York
June 10, 1976

Louise Gruner Gans
of Counsel

MARTIE L. THOMPSON
Attorney for Intervenor-Defendants
Community Action for Legal Services, Inc.
335 Broadway
New York, New York 10013
(212) 966-6600

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al., Plaintiffs, -against- JAMES E. DUMPSON, individually and as Administrator of the New York City Human Resources Administration, et al., Defendants.	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES 74 Civ. 2010 (RLC) (3 Judge Court)

S I R S :

NOTICE IS HEREBY GIVEN that DANIELLE and ERIC GANDY, RAFAEL SERRANO and CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, the infant Plaintiffs herein hereby appeal to the Supreme Court of the United States from the final order and judgment of the three-judge court entered in this action on April 14, 1976 declaring §§383(2) and 400 of the New York Social Services Law and N.Y.C.R.R. §450.14 unconstitutional as presently applied, and granting permanent injunctive relief, and plaintiffs hereby appeal from each and every part of said Order except so much as stays the effective date for 30 days.

This appeal is taken pursuant to 28 U.S.C. §1253.

Dated: New York, New York
June 11, 1976

Yours, etc.,

Helen L. Buttenwieser

HELEN L. BUTTENWIESER, ESQ.
Attorney for Appellants-Plaintiffs
Office and P.O. Address
575 Madison Avenue
New York, New York 10022
Tel. No. (212) 826-1600

TO: LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Defendants Shapiro and Lavine
Office and P.O. Address
Two World Trade Center
New York, New York 10047
By: Mark C. Rutzick
Assistant Attorney General

W. BERNARD RICHLAND, ESQ.
Corporation Counsel
Attorney for Defendants
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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al. v. JAMES DUMPSON, et al.

74 Civ. 2010

ENDORSEMENT

In October, 1974, because of the potential for conflict of interest between the plaintiff children and plaintiff foster parents, both represented by the same counsel, Helen Buttenweiser was appointed by the court to represent the interests of the proposed class of foster children. Plaintiff foster parents then moved under Rule 17(c), F.R.Civ.P., for an order continuing the New York Civil Liberties Union as counsel to foster children, or in the alternative, for the appointment of a guardian ad litem for the children. Both alternative requests of the motion were denied, and the selection of Helen Buttenweiser was reaffirmed by opinion dated December 10, 1974.

Plaintiff foster parents now move for the second time for an order under Rule 17(c), F.R.Civ.P., substituting new counsel for plaintiff foster children or in the alternative for the court to appoint a guardian ad litem for plaintiff foster children. Plaintiff parents also suggest that additional counsel for the children might be appointed who would assert a position other than that taken by Ms. Buttenweiser. Foster parents assert that separate counsel is needed now because appointed counsel for the plaintiff children will not defend the three-judge court's decision of March 22, 1976, recognizing that foster children possess certain rights and mandating a hearing prior to the removal of a foster child from a foster home.

At the time Ms. Buttenweiser was appointed counsel to the foster children, her mandate was to represent that class of individuals in the way that, based on her knowledge and experience, she thought stated the best interests of her clients. I pointed out at page 13 of the December 10, 1974 opinion:

"It is my view that there must be independent counsel whose sole commitment is to the children, and who is therefore free to advocate their interests vigorously even though they may conflict with the interests of some other party to this litigation."

Ms. Buttenweiser has consistently represented the position she sincerely believes to voice the best interests of the foster children she was appointed to speak for. While it is concededly somewhat anomalous to have counsel for the prevailing party arguing against the court's position, Ms. Buttenweiser has made her views clear from the outset, and despite our holding, those views have not changed. I believe her position is unsound but I cannot question that she is honestly and sincerely performing the responsibilities which were assigned to her. Accordingly, I see no reason now to replace her or to supplement her efforts because the position she has taken conflicts with the holding of the majority of the three-judge court. The motion is denied.

SO ORDERED.

Dated: New York, New York
June 29, 1976

ROBERT L. CARTER
U.S.D.J.

Letter 186

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,

Plaintiffs,

-against-

JAMES DUMPSON, et al.,

Defendants,

NAOMI RODRIGUEZ; ORSA DIAZ; MARY ROBINS; DOROTHY NELSON; SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenor-Defendants.

74 Civ. 2010 RLC

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs herein hereby appeal to the United States Court of Appeals for the Second Circuit from the opinion and order of the Honorable Robert L. Carter, entered in this action on June 29, 1976, denying plaintiff foster parents' motion to substitute new counsel for plaintiff foster children and the class they represent or, in the alternative, to appoint additional counsel who will represent the rights and interests of plaintiff foster children as determined by the three-judge court in its decision dated March 22, 1976.

Dated: New York, New York
July 16, 1976

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